

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**OHIO COAL ASSOCIATION, et al.,**

**v.**

Case No. 2:14-cv-2646

**THOMAS E. PEREZ, et al.,**

Defendants.

**and**

**MURRAY ENERGY CORPORATION, Case No. 2:15-cv-448  
et al.,**

Judge Graham

Plaintiffs,

Magistrate Judge Deavers

**v.**

**THOMAS E. PEREZ, et al.,**

Defendants.

**ADMINISTRATIVE RECORD**

**PAGES 00001 – 00238**

CY	No. of Violations Assessed	No. of Assessed Violations Contested*	No. of Contested Violations Disposed*	No. of Final Orders	Vacated	No. of Disposed Violations with changes to:					
						S&S	Negligence	Persons Affected	Injury Severity	Likelihood	
2006	135,718	9,624	8,877	134,971	587	803	577	132	232	518	1,624
2007	130,134	18,816	16,828	128,146	848	1,432	1,243	575	580	947	3,438
2008	198,612	46,337	31,180	183,455	1,298	2,957	2,769	1,225	1,458	2,319	7,674
2009	173,717	46,396	12,278	139,599	617	756	1,403	500	565	1,009	3,122
2010	166,435	39,582	922	127,775	47	93	138	24	42	90	268
Totals	804,616	160,755	70,085	713,946	3,397	6,041	6,130	2,456	2,877	4,883	16,126

9%

\* Based on year assessed - CY 2010 assessments still being contested.

CY	No. of Final Orders	No. Not Final as of 1/6/2011	Vacated	Percent of Final Orders with changes to:					
				S&S	Negligence	Persons Affected	Injury Severity	Likelihood	Any
2006	134,971	747	0.4%	0.6%	0.4%	0.1%	0.2%	0.4%	1.2%
2007	128,146	1,988	0.7%	1.1%	1.0%	0.4%	0.5%	0.7%	2.7%
2008	183,455	15,157	0.7%	1.6%	1.5%	0.7%	0.8%	1.3%	4.2%
2009	139,599	34,118	0.4%	0.5%	1.0%	0.4%	0.4%	0.7%	2.2%
2010	127,775	38,660	0.0%	0.1%	0.1%	0.0%	0.0%	0.1%	0.2%
Totals	713,946	90,670	0.5%	0.8%	0.9%	0.3%	0.4%	0.7%	2.3%

*Docket No.	Contest Date	*Decision Date	Days to Decision
YORK 2010-78M	11/25/2009	11/1/2010	341
KENT 2009-1484	8/21/2009	11/1/2010	437
KENT 2010-832	3/16/2010	11/1/2010	230
KENT 2008-1433	8/13/2008	11/1/2010	810
KENT 2009-327	11/26/2008	11/1/2010	705
WEVA 2009-784	2/3/2009	11/1/2010	636
PENN 2010-412M	3/30/2010	11/1/2010	216
KENT 2009-1457	8/14/2009	11/1/2010	444
PENN 2010-505M	5/11/2010	11/1/2010	174
KENT 2009-888	4/7/2009	11/1/2010	573
SE 2009-92M	11/5/2008	11/2/2010	727
WEVA 2009-825	2/10/2009	11/2/2010	630
WEVA 2009-847	2/17/2009	11/2/2010	623
WEVA 2009-867	2/20/2009	11/2/2010	620
WEVA 2009-940	3/11/2009	11/2/2010	601
WEVA 2009-941	3/11/2009	11/2/2010	601
KENT 2009-1507	1/12/2010	11/2/2010	294
LAKE 2010-286M	12/31/2009	11/2/2010	306
LAKE 2010-378M	2/1/2010	11/2/2010	274
SE 2010-400M	1/20/2010	11/2/2010	286
SE 2010-514M	3/2/2010	11/2/2010	245
KENT 2009-831	3/25/2009	11/2/2010	587
WEVA 2009-750	1/29/2009	11/2/2010	642
WEVA 2009-967	3/16/2009	11/2/2010	596
VA 2010-24	10/20/2009	11/2/2010	378
VA 2008-216	4/4/2008	11/2/2010	942
VA 2010-139M	12/15/2009	11/2/2010	322
LAKE 2010-96M	10/27/2009	11/2/2010	371
PENN 2009-205	12/17/2008	11/2/2010	685
WEVA 2009-925	3/5/2009	11/2/2010	607
LAKE 2010-241M	12/15/2009	11/2/2010	322
VA 2010-23	10/20/2009	11/2/2010	378
VA 2010-45	10/29/2009	11/2/2010	369
VA 2010-163	12/28/2009	11/2/2010	309
SE 2010-465M	2/23/2010	11/2/2010	252
WEVA 2009-788	2/3/2009	11/2/2010	637
WEVA 2009-965	3/13/2009	11/2/2010	599
WEVA 2008-552	2/21/2008	11/2/2010	985
CENT 2010-647M	4/21/2010	11/2/2010	195
KENT 2009-577M	1/14/2009	11/2/2010	657
WEVA 2009-775	2/4/2009	11/2/2010	636
WEVA 2009-408	12/5/2008	11/2/2010	697
WEVA 2009-512M	12/22/2008	11/2/2010	680
VA 2009-361	7/21/2009	11/2/2010	469
SE 2010-634M	4/8/2010	11/2/2010	208
WEVA 2009-773	2/3/2009	11/2/2010	637

WEVA 2009-789	2/3/2009	11/2/2010	637
WEVA 2009-938	3/10/2009	11/2/2010	602
WEVA 2009-1611M	6/30/2009	11/2/2010	490
VA 2010-74	11/18/2009	11/2/2010	349
KENT 2009-285	11/21/2008	11/2/2010	711
KENT 2010-320	12/8/2009	11/2/2010	329
WEVA 2009-846	2/17/2009	11/2/2010	623
WEVA 2009-733	1/27/2009	11/2/2010	644
WEVA 2009-1072	3/26/2009	11/2/2010	586
SE 2010-475M	2/25/2010	11/2/2010	250
KENT 2009-876	4/7/2009	11/2/2010	574
WEVA 2009-749	1/29/2009	11/2/2010	642
WEVA 2009-551	12/30/2008	11/2/2010	672
WEVA 2009-720	1/23/2009	11/2/2010	648
WEVA 2009-734	1/27/2009	11/2/2010	644
KENT 2010-347M	12/15/2009	11/2/2010	322
LAKE 2010-384M	2/2/2010	11/2/2010	273
WEVA 2009-1830	8/19/2009	11/2/2010	440
WEVA 2009-1261	4/20/2009	11/2/2010	561
LAKE 2009-746M	9/28/2009	11/3/2010	401
WEST 2009-354M	1/7/2009	11/3/2010	665
WEST 2009-355M	1/7/2009	11/3/2010	665
WEST 2008-1178M	6/24/2008	11/3/2010	862
KENT 2008-1233M	7/2/2008	11/3/2010	854
SE 2009-561	6/2/2009	11/3/2010	519
KENT 2008-432	1/16/2008	11/3/2010	1022
KENT 2009-915	4/14/2009	11/3/2010	568
LAKE 2009-566	7/16/2009	11/3/2010	475
WEST 2009-50M	10/15/2008	11/3/2010	749
KENT 2008-1193	6/25/2008	11/3/2010	861
WEST 2009-330M	12/31/2008	11/3/2010	672
WEST 2009-371M	1/12/2009	11/3/2010	660
WEST 2009-390M	1/14/2009	11/3/2010	658
WEST 2009-675M	3/30/2009	11/3/2010	583
KENT 2009-973	4/27/2009	11/3/2010	555
WEST 2008-1159M	6/17/2008	11/3/2010	869
SE 2008-955	8/13/2008	11/3/2010	812
WEVA 2009-19	10/2/2008	11/3/2010	762
CENT 2009-797	8/31/2009	11/3/2010	429
KENT 2009-910	4/14/2009	11/3/2010	568
WEST 2009-372M	1/12/2009	11/3/2010	660
KENT 2008-1176M	6/20/2008	11/3/2010	866
KENT 2009-181	11/4/2008	11/3/2010	729
WEST 2009-380	11/7/2008	11/3/2010	726
WEST 2009-44M	10/6/2008	11/3/2010	758
KENT 2008-1282	7/10/2008	11/3/2010	846
KENT 2009-12	10/6/2008	11/3/2010	758

LAKE 2010-714	8/31/2010	11/3/2010	64
KENT 2008-1038	5/20/2008	11/3/2010	897
WEST 2009-331M	12/31/2008	11/3/2010	672
WEST 2009-389M	1/14/2009	11/3/2010	658
SE 2009-712M	7/17/2009	11/3/2010	474
KENT 2009-970	4/27/2009	11/3/2010	555
WEVA 2008-518	2/1/2008	11/3/2010	1006
WEST 2009-356M	1/7/2009	11/3/2010	665
KENT 2008-685	3/14/2008	11/3/2010	964
KENT 2008-999	5/1/2008	11/3/2010	916
WEST 2009-236M	11/26/2008	11/3/2010	707
WEST 2009-778M	4/24/2009	11/4/2010	559
KENT 2009-62	10/9/2008	11/4/2010	756
KENT 2009-1565	9/24/2009	11/4/2010	406
KENT 2009-1570	9/23/2009	11/4/2010	407
KENT 2008-880	4/23/2008	11/5/2010	926
WEST 2010-855M	3/15/2010	11/5/2010	235
WEVA 2008-381	12/28/2007	11/5/2010	1043
KENT 2008-1447	8/14/2008	11/5/2010	813
SE 2009-788M	8/3/2009	11/5/2010	459
WEVA 2007-670	8/14/2007	11/5/2010	1179
KENT 2009-1326	7/16/2009	11/5/2010	477
KENT 2008-879	4/23/2008	11/5/2010	926
VA 2010-427	6/14/2010	11/8/2010	147
VA 2010-318M	4/2/2010	11/8/2010	220
VA 2010-285M	3/15/2010	11/8/2010	238
VA 2010-399M	5/24/2010	11/8/2010	168
YORK 2010-210M	4/2/2010	11/8/2010	220
YORK 2010-231M	5/1/2010	11/8/2010	191
VA 2009-137	1/13/2009	11/8/2010	664
VA 2010-387M	5/18/2010	11/8/2010	174
VA 2010-343	4/27/2010	11/8/2010	195
VA 2010-287M	3/22/2010	11/8/2010	231
VA 2010-374	5/11/2010	11/8/2010	181
VA 2010-396	5/24/2010	11/8/2010	168
VA 2010-397	5/24/2010	11/8/2010	168
VA 2010-394	5/24/2010	11/8/2010	168
VA 2010-405M	5/28/2010	11/8/2010	164
WEVA 2009-173	10/28/2008	11/8/2010	741
VA 2010-371	5/6/2010	11/8/2010	186
VA 2010-317M	4/1/2010	11/8/2010	221
VA 2010-186	1/7/2010	11/9/2010	306
PENN 2010-359	3/5/2010	11/9/2010	249
LAKE 2009-148M	12/9/2008	11/9/2010	700
LAKE 2009-724M	9/21/2009	11/9/2010	414
LAKE 2010-220M	12/14/2009	11/9/2010	330
PENN 2010-453M	4/13/2010	11/9/2010	210

PENN 2010-466M	4/27/2010	11/9/2010	196
LAKE 2009-572	7/21/2009	11/9/2010	476
KENT 2008-777	3/31/2008	11/9/2010	953
PENN 2010-364	3/5/2010	11/9/2010	249
PENN 2010-431	4/2/2010	11/9/2010	221
LAKE 2009-695M	9/3/2009	11/9/2010	432
LAKE 2010-240M	12/15/2009	11/9/2010	329
LAKE 2010-336M	1/12/2010	11/9/2010	301
WEST 2010-941M	3/31/2010	11/9/2010	223
PENN 2010-421	4/2/2010	11/9/2010	221
LAKE 2010-180M	11/23/2009	11/9/2010	351
LAKE 2010-281M	12/31/2009	11/9/2010	313
LAKE 2010-327M	1/8/2010	11/9/2010	305
KENT 2009-1127	5/28/2009	11/9/2010	530
LAKE 2010-287M	12/31/2009	11/9/2010	313
PENN 2010-456M	4/15/2010	11/9/2010	208
SE 2007-476	9/14/2007	11/9/2010	1152
CENT 2008-514M	4/28/2008	11/9/2010	925
KENT 2009-1098	5/22/2009	11/9/2010	536
LAKE 2008-351M	10/8/2009	11/9/2010	397
LAKE 2009-149M	12/9/2008	11/9/2010	700
LAKE 2010-125M	11/4/2009	11/9/2010	370
LAKE 2010-366M	1/25/2010	11/9/2010	288
SE 2009-34M	10/16/2008	11/9/2010	754
PENN 2010-371	3/5/2010	11/9/2010	249
WEST 2008-911	4/28/2008	11/9/2010	925
KENT 2009-1317	7/15/2009	11/9/2010	482
LAKE 2009-545M	7/1/2009	11/9/2010	496
LAKE 2010-396	2/4/2010	11/9/2010	278
PENN 2010-365	3/5/2010	11/9/2010	249
LAKE 2009-731M	9/25/2009	11/9/2010	410
LAKE 2010-155M	11/16/2009	11/9/2010	358
LAKE 2010-172M	11/19/2009	11/9/2010	355
LAKE 2010-21	10/5/2009	11/9/2010	400
LAKE 2010-331	10/14/2009	11/9/2010	391
LAKE 2010-179M	11/25/2009	11/9/2010	349
CENT 2009-20	10/17/2008	11/10/2010	754
CENT 2009-107	11/25/2008	11/10/2010	715
CENT 2009-216	1/21/2009	11/10/2010	658
LAKE 2009-599	7/29/2009	11/10/2010	469
KENT 2009-1461	8/18/2009	11/10/2010	449
CENT 2010-90M	10/27/2009	11/10/2010	379
CENT 2008-427	3/26/2008	11/10/2010	959
CENT 2009-218	1/21/2009	11/10/2010	658
CENT 2009-285	2/24/2009	11/10/2010	624
LAKE 2009-460M	5/11/2009	11/10/2010	548
CENT 2008-450	3/26/2008	11/10/2010	959

CENT 2010-16M	10/5/2009	11/10/2010	401
LAKE 2009-488	5/28/2009	11/10/2010	531
LAKE 2009-574	7/22/2009	11/10/2010	476
CENT 2009-458M	5/20/2009	11/10/2010	539
SE 2008-594M	4/17/2008	11/10/2010	937
CENT 2009-396	4/24/2009	11/10/2010	565
KENT 2009-1454	8/14/2009	11/10/2010	453
WEST 2009-469M	2/2/2009	11/10/2010	646
CENT 2009-217	1/21/2009	11/10/2010	658
CENT 2009-395	4/24/2009	11/10/2010	565
KENT 2009-99	10/16/2008	11/10/2010	755
CENT 2010-71M	10/23/2009	11/10/2010	383
CENT 2010-482	2/23/2010	11/10/2010	260
CENT 2009-274	2/18/2009	11/10/2010	630
CENT 2009-349	3/27/2009	11/10/2010	593
CENT 2010-738M	5/18/2010	11/10/2010	176
WEVA 2010-75	10/14/2009	11/12/2010	394
WEVA 2009-1751	7/30/2009	11/12/2010	470
WEVA 2010-26	10/2/2009	11/12/2010	406
WEVA 2009-1610	6/30/2009	11/12/2010	500
WEVA 2009-1753	7/30/2009	11/12/2010	470
WEVA 2010-141M	10/20/2009	11/12/2010	388
WEVA 2010-231	11/12/2009	11/12/2010	365
WEVA 2010-252	11/17/2009	11/12/2010	360
WEVA 2009-1603M	6/26/2009	11/12/2010	504
WEVA 2009-876	2/20/2009	11/12/2010	630
KENT 2009-869M	4/2/2009	11/15/2010	592
PENN 2010-525M	6/7/2010	11/15/2010	161
LAKE 2010-694M	4/28/2010	11/15/2010	201
WEST 2010-1451M	6/28/2010	11/15/2010	140
SE 2010-104M	10/23/2009	11/15/2010	388
WEST 2010-1001M	4/9/2010	11/15/2010	220
WEST 2010-1520M	7/8/2010	11/15/2010	130
WEST 2010-979M	4/8/2010	11/15/2010	221
PENN 2009-438	4/14/2009	11/15/2010	580
LAKE 2010-676	4/21/2010	11/15/2010	208
WEST 2010-980M	4/7/2010	11/15/2010	222
WEST 2010-1418M	6/22/2010	11/15/2010	146
LAKE 2010-693M	4/28/2010	11/15/2010	201
WEST 2010-1195M	5/12/2010	11/15/2010	187
WEST 2010-1510M	7/8/2010	11/15/2010	130
WEST 2010-1554M	7/16/2010	11/15/2010	122
LAKE 2009-243	1/23/2009	11/17/2010	663
KENT 2010-755	3/2/2010	11/17/2010	260
KENT 2009-946	4/21/2009	11/17/2010	575
WEST 2009-1436M	9/25/2009	11/17/2010	418
SE 2009-268	2/10/2009	11/17/2010	645

SE 2008-387M	3/5/2008	11/17/2010	987
LAKE 2008-119	12/28/2007	11/17/2010	1055
WEVA 2008-1790	8/30/2008	11/17/2010	809
WEVA 2008-1788	8/30/2008	11/17/2010	809
WEVA 2008-1789	8/30/2008	11/17/2010	809
LAKE 2009-438	4/24/2009	11/17/2010	572
LAKE 2009-523	6/22/2009	11/17/2010	513
WEST 2009-1256M	8/13/2009	11/17/2010	461
LAKE 2009-501	6/3/2009	11/17/2010	532
SE 2009-93M	9/17/2008	11/17/2010	791
WEST 2009-924M	5/27/2009	11/17/2010	539
WEVA 2009-1460	5/20/2009	11/18/2010	547
SE 2009-639M	6/24/2009	11/18/2010	512
WEST 2008-1330M	7/28/2008	11/18/2010	843
WEVA 2009-932	3/6/2009	11/18/2010	622
SE 2009-293M	9/1/2009	11/18/2010	443
WEVA 2009-1458	5/20/2009	11/18/2010	547
SE 2009-398M	4/6/2009	11/19/2010	592
KENT 2008-397	12/26/2007	11/19/2010	1059
WEST 2009-740M	4/20/2009	11/19/2010	578
WEST 2008-1332M	7/29/2008	11/19/2010	843
VA 2010-79	11/24/2009	11/19/2010	360
SE 2008-727M	5/29/2008	11/19/2010	904
SE 2009-400M	4/7/2009	11/19/2010	591
SE 2009-420M	4/14/2009	11/19/2010	584
WEVA 2009-799	2/5/2009	11/19/2010	652
WEVA 2008-1623	8/8/2008	11/19/2010	833
WEVA 2009-1924	9/8/2009	11/19/2010	437
WEST 2009-1237M	8/11/2009	11/19/2010	465
WEVA 2009-82	10/8/2008	11/19/2010	772
KENT 2008-463	1/23/2008	11/19/2010	1031
WEVA 2010-340	12/8/2009	11/19/2010	346
WEVA 2010-595	1/28/2010	11/19/2010	295
SE 2009-230	1/21/2009	11/19/2010	667
SE 2009-397M	4/6/2009	11/19/2010	592
SE 2009-405M	4/7/2009	11/19/2010	591
SE 2009-422M	4/15/2009	11/19/2010	583
SE 2009-451M	4/24/2009	11/19/2010	574
SE 2009-453M	4/27/2009	11/19/2010	571
KENT 2009-207	11/12/2008	11/19/2010	737
KENT 2009-1459	8/18/2009	11/19/2010	458
WEVA 2009-1437	5/20/2009	11/19/2010	548
SE 2010-254	12/4/2009	11/19/2010	350
SE 2009-381M	4/2/2009	11/19/2010	596
WEVA 2009-1168	4/14/2009	11/19/2010	584
SE 2009-641M	6/24/2009	11/19/2010	513
WEVA 2010-594	1/28/2010	11/19/2010	295

SE 2009-452M	4/24/2009	11/19/2010	574
WEVA 2010-597	1/28/2010	11/19/2010	295
WEST 2009-1238M	8/11/2009	11/19/2010	465
SE 2009-219	1/14/2009	11/19/2010	674
SE 2009-454M	4/27/2009	11/19/2010	571
KENT 2009-174	11/3/2008	11/19/2010	746
WEST 2008-979M	5/9/2008	11/19/2010	924
WEVA 2009-1725	7/27/2009	11/19/2010	480
VA 2010-220	2/1/2010	11/22/2010	294
VA 2010-414	6/4/2010	11/22/2010	171
VA 2010-328	4/8/2010	11/22/2010	228
VA 2010-392	5/25/2010	11/22/2010	181
SE 2009-699M	7/15/2009	11/22/2010	495
VA 2010-389M	5/20/2010	11/22/2010	186
PENN 2010-393	3/16/2010	11/22/2010	251
WEVA 2008-1825	6/26/2008	11/22/2010	879
WEVA 2009-1681	7/15/2009	11/22/2010	495
YORK 2010-204M	4/1/2010	11/22/2010	235
VA 2010-378M	5/27/2010	11/22/2010	179
KENT 2008-539	2/11/2008	11/22/2010	1015
WEVA 2010-804M	3/24/2010	11/22/2010	243
VA 2010-326	4/7/2010	11/22/2010	229
VA 2010-360	4/30/2010	11/22/2010	206
VA 2010-361	4/30/2010	11/22/2010	206
VA 2010-349	4/28/2010	11/22/2010	208
KENT 2009-1498	8/27/2009	11/22/2010	452
KENT 2008-1332	7/24/2008	11/22/2010	851
VA 2010-324	4/7/2010	11/22/2010	229
SE 2009-687M	11/23/2009	11/22/2010	364
VA 2010-335	4/16/2010	11/22/2010	220
VA 2010-398	5/24/2010	11/22/2010	182
KENT 2009-15	10/6/2008	11/22/2010	777
SE 2009-598M	6/10/2009	11/22/2010	530
WEVA 2010-983M	4/30/2010	11/22/2010	206
YORK 2008-59M	11/14/2007	11/23/2010	1105
LAKE 2010-489M	3/2/2010	11/23/2010	266
WEVA 2009-1654	7/10/2009	11/23/2010	501
WEST 2008-1560M	9/17/2008	11/23/2010	797
WEVA 2010-1193	6/25/2010	11/23/2010	151
SE 2008-1020	8/26/2008	11/23/2010	819
WEVA 2010-814	3/25/2010	11/23/2010	243
WEST 2010-965M	4/1/2010	11/23/2010	236
SE 2010-162	11/19/2009	11/23/2010	369
PENN 2010-443	4/8/2010	11/23/2010	229
PENN 2010-447	4/8/2010	11/23/2010	229
WEVA 2009-1730	7/28/2009	11/23/2010	483
WEST 2010-1423M	6/23/2010	11/23/2010	153

KENT 2009-286	11/18/2008	11/23/2010	735
KENT 2008-1365	7/31/2008	11/23/2010	845
KENT 2008-1367	7/31/2008	11/23/2010	845
WEVA 2008-703M	9/4/2008	11/23/2010	810
WEVA 2009-1651	7/10/2009	11/23/2010	501
WEVA 2009-1653	7/10/2009	11/23/2010	501
VA 2008-53	12/12/2007	11/23/2010	1077
SE 2008-227M	1/16/2008	11/23/2010	1042
YORK 2009-25M	9/24/2008	11/23/2010	790
KENT 2008-1504	8/25/2008	11/23/2010	820
WEST 2010-956M	4/1/2010	11/23/2010	236
WEVA 2009-1731	7/28/2009	11/23/2010	483
YORK 2010-174M	2/25/2010	11/23/2010	271
WEST 2010-1005M	4/13/2010	11/23/2010	224
SE 2009-583M	6/3/2009	11/23/2010	538
SE 2009-21	8/19/2008	11/23/2010	826
VA 2008-71	1/9/2008	11/23/2010	1049
WEVA 2010-891	4/8/2010	11/23/2010	229
SE 2008-1019	8/26/2008	11/23/2010	819
KENT 2009-437	12/23/2008	11/23/2010	700
WEVA 2009-1615	7/1/2009	11/23/2010	510
WEVA 2009-1684	7/14/2009	11/23/2010	497
WEVA 2009-1685	7/14/2009	11/23/2010	497
WEST 2010-1416M	6/22/2010	11/23/2010	154
KENT 2009-461	12/24/2008	11/24/2010	700
CENT 2009-473M	6/1/2009	11/24/2010	541
CENT 2009-657M	7/24/2009	11/24/2010	488
LAKE 2009-271M	6/19/2009	11/24/2010	523
SE 2009-831M	8/19/2009	11/24/2010	462
KENT 2009-943	4/21/2009	11/24/2010	582
CENT 2010-841M	6/4/2010	11/24/2010	173
SE 2009-344	3/10/2009	11/24/2010	624
LAKE 2009-537	6/29/2009	11/24/2010	513
LAKE 2010-230M	12/15/2009	11/24/2010	344
CENT 2010-33M	10/14/2009	11/24/2010	406
PENN 2009-336	2/10/2009	11/24/2010	652
WEST 2009-1390M	9/21/2009	11/24/2010	429
SE 2009-732M	7/23/2009	11/24/2010	489
KENT 2009-690	2/10/2009	11/24/2010	652
KENT 2009-749	2/26/2009	11/24/2010	636
CENT 2009-658M	7/27/2009	11/24/2010	485
WEST 2008-815M	4/9/2008	11/24/2010	959
WEVA 2009-1728	7/27/2009	11/24/2010	485
CENT 2009-474M	6/1/2009	11/24/2010	541
WEST 2009-905M	5/20/2009	11/24/2010	553
CENT 2010-94M	10/27/2009	11/24/2010	393
WEST 2010-68M	10/16/2009	11/24/2010	404

PENN 2009-423M	4/2/2009	11/24/2010	601
YORK 2007-89M	7/31/2007	11/24/2010	1212
CENT 2009-543M	7/2/2009	11/24/2010	510
KENT 2009-1547	9/18/2009	11/24/2010	432
WEST 2010-286M	11/27/2009	11/24/2010	362
WEST 2008-473M	2/22/2008	11/24/2010	1006
WEVA 2009-1567	6/16/2009	11/26/2010	528
WEVA 2010-193	11/2/2009	11/26/2010	389
WEVA 2009-1451	5/22/2009	11/26/2010	553
WEVA 2009-1552	6/10/2009	11/26/2010	534
WEVA 2009-1413	5/15/2009	11/26/2010	560
KENT 2010-118	10/26/2009	11/26/2010	396
WEVA 2009-1739	7/29/2009	11/26/2010	485
WEVA 2009-1509	6/2/2009	11/26/2010	542
WEVA 2009-1712	7/23/2009	11/26/2010	491
LAKE 2010-410D	4/21/2010	11/26/2010	219
SE 2010-155M	11/16/2009	11/28/2010	377
SE 2010-156M	11/17/2009	11/28/2010	376
SE 2009-559M	6/2/2009	11/28/2010	544
SE 2010-65M	10/13/2009	11/28/2010	411
VA 2010-181M	1/5/2010	11/29/2010	328
CENT 2010-623	4/16/2010	11/29/2010	227
KENT 2009-224	11/14/2008	11/29/2010	745
PENN 2010-382	3/12/2010	11/29/2010	262
PENN 2010-388	3/12/2010	11/29/2010	262
KENT 2008-1115	5/30/2008	11/29/2010	913
KENT 2009-166M	10/30/2008	11/29/2010	760
PENN 2010-379M	3/15/2010	11/29/2010	259
KENT 2009-146	10/28/2008	11/29/2010	762
PENN 2010-384	3/12/2010	11/29/2010	262
WEVA 2007-201	11/10/2009	11/29/2010	384
KENT 2008-1112	5/30/2008	11/29/2010	913
KENT 2010-34	10/7/2009	11/29/2010	418
KENT 2009-180	11/4/2008	11/29/2010	755
PENN 2010-383	3/12/2010	11/29/2010	262
KENT 2009-162M	10/30/2008	11/29/2010	760
VA 2009-196	3/11/2009	11/29/2010	628
PENN 2010-374	3/5/2010	11/29/2010	269
PENN 2010-385	3/12/2010	11/29/2010	262
WEST 2010-769M	3/2/2010	11/29/2010	272
SE 2010-7M	9/28/2009	11/29/2010	427
SE 2009-806M	8/10/2009	11/29/2010	476
SE 2009-428M	4/20/2009	11/29/2010	588
WEST 2009-704	4/10/2009	11/29/2010	598
KENT 2008-1113	5/30/2008	11/29/2010	913
VA 2009-195	3/11/2009	11/29/2010	628
SE 2009-707M	7/14/2009	11/29/2010	503

VA 2010-122M	12/8/2009	11/29/2010	356
LAKE 2010-543	3/18/2010	11/29/2010	256
SE 2009-154	12/4/2008	11/30/2010	726
VA 2010-372	5/5/2010	11/30/2010	209
WEVA 2009-75	10/7/2008	11/30/2010	784
SE 2008-574M	4/8/2008	11/30/2010	966
SE 2008-838M	7/9/2008	11/30/2010	874
KENT 2009-1237	6/24/2009	11/30/2010	524
WEVA 2010-786M	3/17/2010	11/30/2010	258
SE 2009-141M	11/26/2008	11/30/2010	734
VA 2010-219	2/1/2010	11/30/2010	302
SE 2009-805M	8/10/2009	11/30/2010	477
KENT 2009-432	12/23/2008	11/30/2010	707
KENT 2009-1394	7/31/2009	11/30/2010	487
SE 2008-398M	3/12/2008	11/30/2010	993
SE 2009-11	10/6/2008	11/30/2010	785
KENT 2009-11	10/6/2008	11/30/2010	785
VA 2010-380	5/12/2010	11/30/2010	202
VA 2010-408	6/1/2010	11/30/2010	182
KENT 2009-1434	8/11/2009	11/30/2010	476

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#	District	Field Office	Mine ID	Mine Name	Inspection Start Date for Evaluation	Controller Name	Operator Name	Mine Type	Notice from Assessments to Administrator	Letter Sent To Operator	Included in Press Release
1	District 04	Mt. Hope WV	4606188	Chess Processing	07/16/2007	Massey Energy Company	Elk Run Coal Company Inc	Facility	06/06/2007	06/14/2007	06/14/2007
2	District 04	Mt. Hope WV	4608553	Black King I North Portal	07/02/2007	Massey Energy Company	Elk Run Coal Company Inc	Underground	06/06/2007	06/14/2007	06/14/2007
3	District 04	Mt. Hope WV	4608758	Eagle #1	07/02/2007	Cleveland-Cliffs Inc	Oak Grove Resources LLC	Underground	06/06/2007	06/14/2007	06/14/2007
4	District 07	Hazard KY	1509636	#77	07/11/2007	James River Coal Company	Blue Diamond Coal Company	Underground	06/06/2007	06/14/2007	06/14/2007
5	District 07	Barbourville KY	1512564	Straight Creek #1 Mine	07/10/2007	Ben Bennett	Left Fork Mining Co Inc	Underground	06/06/2007	06/14/2007	06/14/2007
6	District 11	Bessemer AL	0100851	Oak Grove Mine	07/10/2007	Cleveland-Cliffs Inc	Oak Grove Resources LLC	Underground	06/06/2007	06/14/2007	06/14/2007
7	Northcentral District	Marquette MI	2000422	Tilden Mine	07/10/2007	Ontario Tilden Company; Cliffs TIOP Inc	Tilden Mining Company L C	Surface	06/06/2007	06/14/2007	06/14/2007
8	Western District	San Bernardino CA	0400011	Oro Grande Quarry	07/10/2007	Texas Industries Inc	Riverside Cement Co	Facility	06/06/2007	06/13/2007	06/14/2007
9	Southeastern District	Lexington KY	1504469	KOSMOS CEMENT CO.	03/03/2008	Cemex SA	CEMEX INC	Facility	11/23/2007	12/06/2007	12/07/2007
10	District 03	St. Clairsville OH	4601437	McElroy Mine	01/07/2008	CONSOL Energy Inc	McElroy Coal Company	Underground	12/04/2007	12/06/2007	12/07/2007
11	District 04	Madison WV	4607273	Justice #1	01/07/2008	Massey Energy Company	Independence Coal Company Inc	Underground	12/04/2007	12/06/2007	12/07/2007
12	District 04	Mt. Hope WV	4608315	Brushy Eagle	01/07/2008	Massey Energy Company	Marfork Coal Company Inc	Underground	12/04/2007	12/06/2007	12/07/2007
13	District 04	Mt. Hope WV	4608436	Upper Big Branch Mine-South	01/07/2008	Massey Energy Company	Performance Coal Company	Underground	12/04/2007	12/06/2007	12/07/2007
14	District 04	Mt. Hope WV	4608645	Twilight Mtr Surface Mine	01/07/2008	Massey Energy Company	Progress Coal	Surface	12/04/2007	12/06/2007	12/07/2007
15	District 04	Madison WV	4608890	Rivers Edge Mine	01/07/2008	Patriot Coal Corporation	Rivers Edge Mining Inc	Underground	12/04/2007	12/06/2007	12/07/2007
16	District 04	Logan WV	4608994	Deep Mine No. 8	01/07/2008	James H Booth	Argus Energy WV, LLC	Underground	12/04/2007	12/06/2007	12/07/2007
17	District 04	Pineville WV	4609020	No 65	01/07/2008	James C Justice II	Double Bonus Coal Company	Underground	12/04/2007	12/06/2007	12/07/2007
18	District 05	Norton VA	4404946	No 2	01/02/2008	Alpha Natural Resources LLC	Black Dog Coal Corporation	Underground	12/04/2007	12/06/2007	12/07/2007
19	District 05	Norton VA	4407029	No 1 Washer	02/19/2008	Charles D Mullins	Commonwealth Mining, LLC	Facility	12/04/2007	12/06/2007	12/07/2007
20	District 05	Norton VA	4407081	No. 2	02/01/2008	Ervin Stiltner	Regent Allied Carbon Energy, Inc.	Underground	12/04/2007	12/06/2007	12/07/2007
21	District 06	Pikeville KY	1508079	Mine No 3	01/07/2008	Alliance Resource Partners LP	Excel Mining LLC	Underground	12/04/2007	12/06/2007	12/07/2007

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22	District 06	Pikeville KY	1518381	Taylor Fork Energy	01/02/2008	Massey Energy Company	Sidney Coal Co., Inc.	Underground	12/04/2007	12/06/2007	12/07/2007
23	District 07	Barbourville KY	1502502	Shamrock #18 Series	01/15/2008	James River Coal Company	Shamrock Coal Company Incorporated	Underground	12/04/2007	12/06/2007	12/07/2007
24	District 07	Barbourville KY	1511065	#4	01/19/2008	James River Coal Company	Bledsoe Coal Corp	Underground	12/04/2007	12/06/2007	12/07/2007
25	District 07	Harlan KY	1518182	D & C Mining Corp,	01/22/2008	H. Garrison Hill	D & C Mining Corp	Underground	12/04/2007	12/06/2007	12/07/2007
26	District 07	Barbourville KY	1518267	RB #10	01/22/2008	Ben Bennett	Manalapan Mining Company Inc	Underground	12/04/2007	12/06/2007	12/07/2007
27	District 07	Harlan KY	1518694	Bardo #1	02/27/2008	James C Justice II	Bardo Mining LLC	Underground	12/04/2007	12/06/2007	12/07/2007
28	District 07	Jacksboro TN	4003237	Mine No. 11	01/11/2008	National Coal Corporation	National Coal Corporation	Underground	12/04/2007	12/06/2007	12/07/2007
29	District 03	Bridgeport WV	4608194	Pleasant Hill Mine	07/02/2008	Metinvest B V	Carter Roag Coal Company	Underground	06/03/2008	06/11/2008	06/17/2008
30	District 04	Mt. Carbon WV	4608759	Eagle Mine	07/02/2008	Robert E Ellis	Newtown Energy Inc	Underground	06/03/2008	06/12/2008	06/17/2008
31	District 04	Logan WV	4608994	Deep Mine No 8	07/17/2008	James H Booth	Argus Energy WV LLC	Underground	06/03/2008	06/12/2008	06/17/2008
32	District 04	Pineville WV	4609020	No 65	07/21/2008	James C Justice II	Double Bonus Coal Company	Underground	06/03/2008	06/12/2008	06/17/2008
33	District 05	Norton VA	4407137	No. 2	08/25/2008	Ervin Stiltner; Keith Stiltner	Patriot Mining, LLC	Underground	06/03/2008	06/12/2008	06/17/2008
34	District 06	Martin KY	1509571	Mine No 2	07/02/2008	Alliance Resource Partners LP	Excel Mining LLC	Underground	06/03/2008	06/12/2008	06/17/2008
35	District 06	Martin KY	1510271	#1 Plant	07/17/2008	Clark D Pergrem	NFC Mining Incorporated	Facility	06/03/2008	06/12/2008	06/17/2008
36	District 06	Pikeville KY	1517651	Mine #1	07/01/2008	Massey Energy Company	Rockhouse Energy Mining Company	Underground	06/03/2008	06/12/2008	06/17/2008
37	District 07	Harlan KY	1517165	Mine #1	07/14/2008	Richard Gilliam	Stillhouse Mining LLC	Underground	06/03/2008	06/12/2008	06/17/2008
38	District 07	Hazard KY	1517478	#75	07/11/2008	James River Coal Company	Blue Diamond Coal Company	Underground	06/03/2008	06/12/2008	06/17/2008
39	District 07	Harlan KY	1518182	D & C Mining Corp,	07/09/2008	Harrison G Hill	D & C Mining Corp	Underground	06/03/2008	06/12/2008	06/17/2008
40	District 07	Harlan KY	1518861	Mine No 1	07/09/2008	James H Hurley	Conshor Mining LLC	Underground	06/03/2008	06/12/2008	06/17/2008
41	District 09	Aztec NM	0500266	King I	07/10/2008	GCC of America	GCC Energy LLC	Underground	06/03/2008	06/12/2008	06/17/2008
42	Northcentral District	Marquette MI	2000422	Tilden Mine		Ontario Tilden Company; Cliffs TIOP Inc	Tilden Mining Company LC	Surface	06/03/2008	06/17/2008	06/17/2008
43	Southeastern District	Lexington KY	1505484	Plant Black River Operation		Carmeuse Holding SA; Lafarge SA	Carmeuse Lime and Stone Inc	Facility	06/03/2008	06/16/2008	06/17/2008
44	District 03	Bridgeport WV	4609136	Broad Run Mine	04/01/2009	Richard (Barry) Hale	Big River Mining LLC	Underground	02/27/2009	03/12/2009	03/16/2009
45	District 04	Madison WV	4603755	Liberty Processing	04/07/2009	Massey Energy Company	Independence Coal Company Inc	Facility	02/27/2009	03/12/2009	03/16/2009

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46	District 04	Mt. Hope WV	4607009	Castle Mine	04/07/2009	Massey Energy Company	Elk Run Coal Company Inc	Underground	02/27/2009	03/12/2009	03/16/2009
47	District 04	Logan WV	4608249	Surface No 1	04/06/2009	Rhonda Marcum	Stollings Trucking Company Inc	Surface	02/27/2009	03/12/2009	03/16/2009
48	District 05	Vansant VA	4406685	Paw Paw Mine	04/13/2009	United Company	Banner Blue Coal Company	Underground	02/27/2009	03/12/2009	03/16/2009
49	District 05	Vansant VA	4406866	Mine No. 2	04/13/2009	Robin M Lambert; Philip T Lambert	Snapco, Inc.	Underground	02/27/2009	03/12/2009	03/16/2009
50	District 05	Norton VA	4406947	#1 Mine	04/13/2009	James A Sigmon	Keokee Mining LLC	Underground	02/27/2009	03/12/2009	03/16/2009
51	District 06	Martin KY	1513061	#5A		Carl Kirk	North Star Mining Inc.	Underground	02/27/2009	03/12/2009	03/16/2009
52	District 06	Pikeville KY	1517651	Mine #1	03/30/2009	Massey Energy Company	Rockhouse Energy Mining Company	Underground	02/27/2009	03/12/2009	03/16/2009
53	District 06	Hindman KY	1518793	#5			Double A Mining, Inc	Underground	02/27/2009	03/12/2009	03/16/2009
54	District 07	Hazard KY	1509636	#77	04/01/2009	James River Coal Company	Blue Diamond Coal Company	Underground	02/27/2009	03/12/2009	03/16/2009
55	District 07	Barbourville KY	1518924	Butcher Branch	04/01/2009	Broe Companies Inc	Century Operations LLC	Underground	02/27/2009	03/12/2009	03/16/2009
56	District 09	Price UT	4202074	Horizon Mine	04/22/2009	Cecil Ann Walker	Hidden Splendor Resources Inc	Underground	02/27/2009	03/12/2009	03/16/2009
57	Western District	San Bernardino CA	0402848	Lompoc Plant	05/28/2009	Imerys S A	Celite Corp	Surface	02/27/2009	03/18/2009	03/16/2009
58	Western District	Elko NV	2602512	Leeville	06/11/2009	Newmont Mining Corp	Newmont USA Limited	Underground	02/27/2009	03/18/2009	03/16/2009
59	South Central District	Rolla-North MO	2300457	Buick Mine/Mill	11/02/2009	Renco Group	Doe Run Company	Underground	09/17/2009	10/01/2009	10/07/2009
60	District 04	Madison WV	4607908	Big Mountain No 16		Patriot Coal Corporation	Pine Ridge Coal Company LLC	Underground	09/18/2009	10/01/2009	10/07/2009
61	District 04	Logan WV	4608279	Anna Branch Surface Mine	10/21/2009	Eddie Hurley	Mountain Reclamation & Construction	Surface	09/18/2009	10/01/2009	10/07/2009
62	District 04	Logan WV	4608808	Ruby Energy	10/21/2009	Massey Energy Company	Spartan Mining Co., Inc.	Underground	09/18/2009	10/01/2009	10/07/2009
63	District 04	Madison WV	4608949	Winifrede 12 Mine	10/21/2009	C Ray Peters; Richard N Nester	Laurel Coal Corp.	Underground	09/18/2009	10/01/2009	10/07/2009
64	District 04	Mt. Carbon WV	4609221	Slabcamp	10/22/2009	Massey Energy Company	Mammoth Coal Co.	Underground	09/18/2009	10/01/2009	10/07/2009
65	District 05	Vansant VA	4406804	Tiller No 1	10/23/2009	Massey Energy Company	Knox Creek Coal Corporation	Underground	09/18/2009	10/01/2009	10/07/2009
66	District 06	Phelps KY	1518775	Mine #15	10/21/2009	James River Coal Company	McCoy Elkhorn Coal Corp.	Underground	09/18/2009	10/01/2009	10/07/2009
67	District 08	Vincennes IN	1202010	Air Quality #1 Mine	10/26/2009	Peabody Energy	Black Beauty Coal Company	Underground	09/18/2009	10/01/2009	10/07/2009
68	District 10	Madisonville KY	1517232	Richland No 9	11/02/2009	Gary E Peyton	Pleasant View Mining Company Inc	Underground	09/18/2009	10/01/2009	10/07/2009

# United Mine Workers of America



TELEPHONE  
AREA CODE (202) 842-7200

UNITED MINE WORKERS' BUILDING  
600 FIFTEENTH STREET, N. W.

Washington, D.C.

20005

• 100-121

May 6, 1985

HAND-DELIVERED

Ms. Patricia Silvey  
U.S. Department of Labor  
Mine Safety and Health Administration  
Office of Standards, Regulations & Variances  
4015 Wilson Boulevard, Room 631  
Arlington, VA 22203

Dear Ms. Silvey:

This is in response to the notice published in the February 8, 1985, Federal Register. The United Mine Workers of America wholeheartedly supports MSHA's long overdue decision to develop regulations for implementing section 104(e) of the Federal Mine Safety and Health Act of 1977. Our comments are as follows:

I. Administrative Procedures

A. Initial Identification of Mines

The initial screening procedures employed by MSHA to identify potential pattern violators are critically important to the effective enforcement of section 104(e). The screening process must be broad enough to identify all recidivist violators of the Act. Not only must this process identify operators whose pattern of violations is based upon the receipt of numerous S&S citations, but it must also have the fine-tuned potential to pinpoint those operators who have committed repeated violations of a particular standard or who have a safety record which indicates a lack of attention to a particular area of mine safety or health. Accordingly, the UMWA proposes a bifurcated screening process:

1. Automatic Review

Every quarter those mines whose rate of significant and substantial violations (based upon man-hours worked) over the previous four quarters places them in the 75th percentile for all mines would be placed under review to determine if, based upon specified criteria, they should be subject to a pattern notice. Mines placed under automatic review will not necessarily receive the pattern notice. It is anticipated, however, that most pattern violators will be in the 75th percentile, and the automatic review process will aid in identifying them.

2. Selective Review

As the Senate Committee on Human Resources noted in its report, "pattern does not necessarily mean a prescribed number of violations of predetermined standards." S.Rep. 95-181, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978), p. 621. Thus, in keeping with Congress' directive, the Secretary should develop a means for identifying potential pattern violators who do not rank within the 75th percentile for S&S violations. Accordingly, the UMWA proposes that mines be subject to quarterly selective review if they fall within any of the following categories:

- a. The mine was on a section 104(d) unwarrantable failure sequence during the previous quarter.<sup>1/</sup>

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<sup>1/</sup>In the Secretary's advance notice of proposed rulemaking it is envisioned that a section 104(d) sequence will be a prerequisite to any pattern order issued under section 104(e). It would be a mistake, however, to limit pattern notices only to mines which have been on the section 104(d) sequence. Section 104(d) orders are issued when there have been repeated unwarrantable failure citations. Under section 104(e) there is no requirement that violations establishing the pattern be a result of the operator's "unwarrantable failure." Consequently, making the section 104(d) sequence a prerequisite for the 104(e) notice would run counter to the Legislative scheme. See Leg. Hist. at 621-622. Accordingly, while those mines on a section 104(d) sequence should be reviewed, other operations must be reviewed, as well.

- b. The mine was placed under a section 107(a) imminent danger order during the previous four quarters.
- c. The mine has a high accident rate for the previous four quarters.
- d. There has been a fatality at the mine during the previous four quarters.
- e. There is a high rate of citations and orders, including non-S&S violations, for the previous four quarters, based on man-hours worked.

These selective review criteria are chosen because they indicate that there is an underlying health and safety problem at the mine. Such mines should be scrutinized for possible pattern of offense despite the fact they may have an S&S rate below the 75th percentile.

**B. Notice of Review**

All mines which are under review for potential pattern of violations, whether automatic or selective, shall be given notice to that effect by the Agency. Notice shall also be sent to the representative of miners.

This notice is designed to give operators the opportunity to take concrete actions to improve the citation history at the mine and to implement a remedial plan. MSHA should evaluate these and similar company efforts to correct a pattern of violations when the pattern notice conference is held. See Part D, below.

**C. Identifying Mines Subject to Pattern Notice**

Those mines which are under review because they are high rate violators or meet selective review criteria will be identified as subject to a pattern notice if the review indicates one or more of the following:

- 1. A pattern of S&S violations of a particular standard over a period of time.
- 2. A pattern of S&S violations of standards of a similar nature, indicated by a history of violations over an extended period of time.

such that a continuing hazard in a particular area of mine safety and health, such as roof control, electrical, ventilation, respirable dust, and escapeways, has not been brought under control.

3. A mine-wide pattern of S&S violations which indicates an underlying health and safety problem throughout the mine.
4. If a mine which is under review was also under review one or more times during the previous 365 day period, and there has been no substantial improvement since the immediately previous review, then that mine will be subject to a pattern notice.

**D. Letter of Intent and Pre-Notice Conference**

When MSHA determines that a mine under review is subject to a pattern notice, the Agency should inform the operator and the miners representative of the Agency's intent to issue a pattern notice. The letter of intent should specify the basis for the determination and should give the operator and representative of miners 15 calendar days after receipt to request a conference. At the conference there should be a review of the citation history at the mine. A pattern of violation notice should be issued after the conference unless the operator establishes all of the following:

1. Specific actions were taken, following the notice of review, to improve the citation history;
2. There has been an improvement of the citation history at the mine following the notice of review, and
3. The operator submits a prepared plan to the Agency outlining the course it will follow to avoid future violations and improve its violation record for the long-term.

However, if a mine is identified as subject to a pattern notice more than once within a 365 day period, no conference will be held and the pattern notice will automatically be issued. The scheduling and location of the conference should accommodate the convenience of the miners representative who should be given notice of the conference and suffer no loss of pay for attending.

E. Termination of the Notice

Once a mine is placed on a pattern of violation notice, the notice should only be terminated if a regular inspection of the mine indicates that there are no S&S violations. The Agency has solicited comments on administrative procedures that could be adopted for the purpose of terminating pattern notices. The UMWA is reviewing procedural options and giving them serious consideration.

II. Miscellaneous Concerns

A. State of mind of operator and extenuating circumstances should not be criteria upon which a pattern determination is based.

The UMWA urges the Secretary not to make an operator's state of mind or intent a factor to be considered prior to the issuance of a section 104(e) notice. The Senate Committee report clearly states Congress' wish that intent or state of mind of the operator not be criteria for determining when a pattern of violation exists. Leg. Hist. at 621. Accordingly, the operator's good faith, absence of negligence, knowledge and any extenuating circumstances should not be factored into the Agency's review. If a review of the citation history indicates a pattern of S&S violations, a notice should issue, regardless of mitigating factors. Certainly the issuance of a single S&S citation, not to mention a string of them, should be enough to alert an operator about a health and safety problem at his mine and present him with the need to take corrective action.

B. Review by Arlington rather than by District Managers.

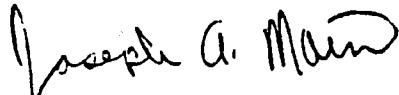
In order to ensure that a standard of review will be consistently and fairly applied to all mines, the quarterly review and the issuance of pattern notices should be performed by the Arlington office.

C. Notice of Representative of Miners

Notice of any decisions or actions taken pursuant to section 104(e) should be provided to the representatives of miners.

If you have any questions or comments on any matters raised in this letter, please do not hesitate to call me.

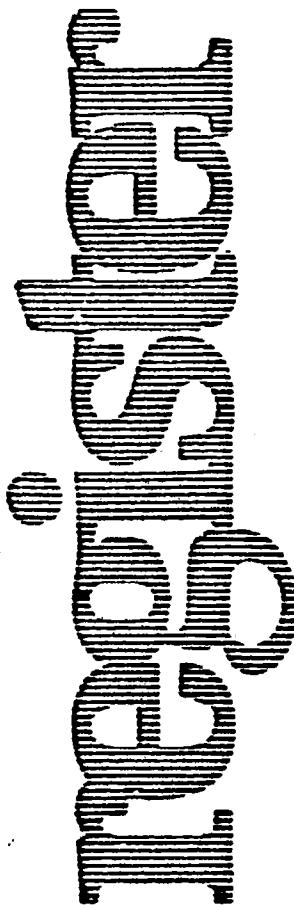
Very truly yours,



Joseph Main, Administrator  
Department of Occupational  
Health and Safety

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Friday  
February 8, 1985



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## Part II

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# Department of Labor

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Mine Safety and Health Administration

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**30 CFR Part 104**

**Identification of Mines Having a Pattern  
of Violations; Withdrawal of Proposed  
Rule and Advance Notice of Proposed  
Rulemaking**

MAR 13 1985

**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**  
**30 CFR Part 104**

**Pattern of Violations**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Withdrawal of proposed rule; advance notice of proposed rulemaking.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is considering rulemaking on criteria and procedures for identifying mines with a pattern of violations of mandatory standards that significantly and substantially contribute to safety and health hazards. On August 15, 1980, MSHA published a proposed rule to establish criteria for identifying mines having a pattern of violations (45 FR 54846). Commenters were generally opposed to the proposal, stating that it was complex, too statistically oriented, and vague. In addition, since that time, administrative litigation resulting in changes in Agency enforcement policies and a 1982 revision of the Agency's civil penalty procedures have affected key provisions of that proposal. The Agency now has experience with these changes and is considering resumption of rulemaking. This notice withdraws the 1980 pattern of violations proposal and outlines for public comment possible criteria and procedures for a new pattern of violations proposal.

**DATES:** This withdrawal is effective February 8, 1985. Comments on the Advance Notice of Proposed Rulemaking must be received by April 9, 1985.

**ADDRESSES:** Office of Standards, Regulations, and Variances, MSHA; Room 631 Ballston Tower No. 3; 4015 Wilson Boulevard; Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:** Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, (703) 235-1910.

**SUPPLEMENTARY INFORMATION:** Under section 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the Secretary of Labor is authorized to issue a notice to a mine operator if the operator's mine has a pattern of violations of mandatory safety or health standards which significantly and substantially contribute to health or safety hazards at the mine. Congress established this provision of the Mine Act to address the problem of mine operators who have recurring violations of health and safety standards.

Under the Mine Act, once a section 104(e) pattern of violations notice is issued, any subsequent inspection within 90 days which reveals another significant and substantial (S&S) violation of mandatory safety or health standards results in the issuance of a withdrawal order until the violation is abated. The Mine Act further provides for withdrawal orders upon any subsequent finding of S&S violations until a complete inspection of the entire mine reveals no S&S violations.

On August 15, 1980 (45 FR 54656), the Mine Safety and Health Administration (MSHA) published a proposal in the Federal Register which would establish criteria for identifying mines which have a pattern of violations. Commenters were generally opposed to the proposal, stating that it was complex, too statistically oriented, overbroad, and vague. In addition, numerous commenters stated that it was inappropriate of MSHA to establish pattern of violations regulations at that time because of litigation pending before the Federal Mine Safety and Health Review Commission (Review Commission) that involved the definition of S&S violations. At that time, MSHA cited all violations as S&S except technical violations and violations that posed only a remote or speculative risk of injury. In April 1981, the Review Commission narrowed the definition of S&S violations. The Review Commission defined S&S violations as those that have a reasonable likelihood of resulting in a reasonably serious injury or illness (*Secretary of Labor v. Cement Division, National Gypsum Co.*, 3 FMSHRC 822). MSHA adopted this revised definition in May 1981.

Commenters also stated that review of the Agency's then pending regulations for the assessment of civil penalties could affect provisions of the pattern of violations proposal. In May 1982, MSHA revised its regulations for the assessment of civil penalties (47 FR 22286).

In view of these developments, MSHA is withdrawing the 1980 pattern of violations proposal. However, the Agency has gained sufficient experience with both the revised definition of S&S violations and the changes made in the civil penalty regulations to reconsider rulemaking to establish procedures and criteria for issuance of a pattern notice.

During preliminary development of a new approach for implementing pattern of violations criteria and procedures, MSHA has been guided by the principle expressed in the Mine Act's legislative history that issuance of a section 104(e) pattern of violations notice should be an enforcement tool reserved for dealing

with chronic violators who do not respond to other efforts to bring their mines into compliance with health and safety standards. Congress made it clear that chronic violators demonstrate a disregard for the safety and health of miners by allowing the same work hazards to occur again and again without addressing the underlying problems.

At this point, MSHA believes that pattern of violations criteria should focus on the health and safety record of each mine rather than on a strictly quantitative comparison of each mine to industry-wide norms. In contrast to the 1980 proposal which relied on a statistically-oriented approach, the Agency envisions use of simplified criteria to identify the existence of a pattern of violations, coupled with procedures for fair and full notice. Review and appeal procedures would be the same as for any other citation or order issued under the Mine Act.

To implement this approach, MSHA is considering an enforcement concept which would incorporate the following elements: initial screening to identify any mines which may be developing a pattern of S&S violations; application of criteria to determine whether a pattern of violations exists at an identified mine; and notification to the mine operator of the potential for a pattern of violations notice with an opportunity to respond.

Initial identification of mines with a possible pattern of violations could occur through regular enforcement activities. Once a mine has been identified, MSHA would review conditions at the mine to determine whether or not a pattern of violations exists at the mine. At this point, MSHA envisions the use of two principal criteria. First, are the S&S violations common to a particular health or safety hazard or are there S&S violations throughout the mine which represent an underlying health or safety problem?

Second, is the mine on a section 104(d) unwarrantable failure sequence, indicating the other enforcement measures have been ineffective? If these two criteria are met, MSHA would notify the mine operator that the operator's mine is subject to a section 104(e) pattern notice and state the reasons upon which such a determination was based. After allowing the operator an opportunity to respond, and absent a change in the health and safety conditions at the mine, MSHA would then issue a section 104(e) pattern notice. Once a mine is placed on a pattern of violations notice, the notice would be terminated upon an inspection

of the mine by MSHA in which no S&S violations are found.

MSHA considers early public participation in formulating criteria and procedures to be used for issuance of pattern of violations notices to be important. In particular, the Agency would like suggestions on what additional factors, if any, should be used for determining whether a pattern of

violation exists. These factors might include work practices or mining conditions at the mine or the mine's accident history. In addition, MSHA would like comments on whether a proposal should include administrative procedures for terminating a pattern notice. The Agency welcomes comments on these and all other issues of concern.

**List of Subjects in 30 CFR Part 104**

Mine safety and health.

Dated January 31, 1985.

David A. Zeger,

*Assistant Secretary for Mine Safety and Health.*

[FR Doc. 85-2929 Filed 2-1-85, 2:43 pm]

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August 30, 1989

Ms. Patricia W. Silvey  
Director, Office of Standards,  
Regulations and Variances  
Mine Safety and Health Administration  
4015 Wilson Boulevard  
Arlington, VA 22203

Dear Ms. Silvey:

The National Coal Association (NCA), Bituminous Coal Operators' Association (BCOA), and the American Mining Congress (AMC) are pleased to respond jointly to the proposed rulemaking on "Pattern of Violations" (30 CFR Part 104 at 54 F.R. 23156, May 30, 1989).

The member companies of our associations produce most of the nation's coal, metals, industrial and agricultural minerals. Therefore, we have a vital interest in the Mine Safety and Health Administration's (MSHA) rulemaking effort to develop the most severe enforcement tool available to the agency.

The enclosed comments reflect the collective efforts and expertise of the operations, safety and health, and legal professionals from the wide range of our member companies. While our comments contain recommendations within the framework established by MSHA, we initially note that this standard is constitutionally suspect due to its failure to clearly prescribe prohibited conduct, and its resulting potential denial of due process.

Furthermore, the need for the rule, currently, is not as evident as in 1977 when the "pattern" amendment was enacted. Congress recognized a possible enforcement need at the time of the 1977 amendments, and directed the Secretary to make "such rules as he deems necessary" to establish criteria for pattern enforcement. (emphases added) We strongly suggest that the pattern provision and the proposed regulations are not necessary and should not be utilized.

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Through enforcement of the 1977 Act, and the cooperative efforts of the industry, MSHA, and labor, great strides have been achieved in mine safety and health. In the period 1975-1977 coal and metal/non-metal mine fatalities averaged 140 and 120 annually, respectively. That average has declined to about 50 annually in each industry. The industry is committed to continuing the trend of reducing mine fatalities and the pattern rule is not necessary to achieve this goal.

Last year was a record year for safety with the lowest number of fatalities for both coal and metal/non-metal mining. The Mine Act is obviously effective, without the pattern of violations enforcement tool. We are convinced that MSHA does not need the "pattern" rule in order to administer the law, and effectuate safety at any mine, as intended by Congress.

The pattern of violations provision in the 1977 Act was based on the Scotia Mine disaster in 1976. At that time, Congress recognized and expressly noted that only a "few" mine operators were so stubbornly disobedient of the law (recalcitrant) as to necessitate the use of a pattern of violations notice. Even in 1976, when the pattern provision was drafted, the "few" operators envisioned by Congress as requiring pattern enforcement did not rise to the level of 27 to 100 mines, as described by MSHA's regulatory analysis document.

Through enforcement of the 1977 Act, the few pre-1977 recalcitrant mine operators are either no longer in business or have improved their health and safety programs. We believe that if there are any remaining recalcitrant mine operators they have not yet been subjected to intense inspections and repeated "unwarrantable failure," "failure to abate," or "imminent danger" closure orders by MSHA. Pattern provision enforcement is simply not necessary when viewed in light of the mining industry in 1989.

We also believe that unless recalcitrance is the controlling factor upon which the pattern enforcement tool is based, the more than, 100,000 significant and substantial citations expected in 1990 could result in every large mine operator being considered a potential pattern candidate despite the efficacy of their safety program. The legislative history of the Mine Act and the significant safety improvements since 1977 clearly indicate that the use of the pattern enforcement tool, if utilized at all, should be extremely limited.

Without prejudice to our position that the Secretary should deem that no rules are necessary to establish criteria

for determining when a pattern exists, or that such rules could be constitutionally suspect, we transmit the enclosed comments for your consideration. We commend the agency for its responsiveness to some of the industry's comments to the February 8, 1985, Advanced Notice of Proposed Rulemaking. Unfortunately, as our enclosed comments point out, a number of crucial elements remain in need of revision. Of particular importance are the following recommendations, for which specific language and/or justifications are contained in our enclosed comments:

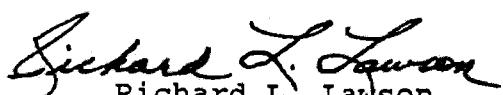
- Properly Focus Pattern Applicability --  
Revise the purpose and scope provision to incorporate Congress' intent to focus the use of the pattern of violations provision to those "few", if any, recalcitrant mine operators that have not responded to the other MSHA enforcement tools.
- End Inconsistent Definitions -- Adopt regulatory definitions of the terms "significant and substantial" and "unwarrantable failure," consistent with review Commission decisions.
- End Undocumented Classification of Violations as S & S -- Eliminate the "significant and substantial" checkbox from the citation form and adopt a narrative analysis format to require inspectors to apply the Commission's definition.
- Place Pattern Screening Responsibility At The National Level -- Adopt procedures that place initial screening for pattern candidates and application of pattern criteria at the Administrator's level, permitting a consistent, independent, unbiased review of both national and local enforcement data. The power of this enforcement tool, and the complexity which will attend any criteria used, demands that the patterns be reviewed only at the highest levels at MSHA.
- Properly Limit The Number of Potential Pattern Candidates -- Adopt an initial screening process that only results in identification of mines with serious, repeat compliance problems, resulting from willful conduct, reckless disregard of the law, or a failure to abate cited violations.

- Limit Pattern Application To Justifiable Cases --  
Adopt pattern criteria that identifies those "few," if any, mines identified as potential pattern violators, whose recalcitrance and safety performance justifies imposition of the series of closure orders that will undoubtedly result from pattern application.
- Encourage Safety Not Mine Closures -- Adopt opportunities for remedial action and administrative conferences, prior to the institution of a pattern.
- Reward Improved Safety Instead Of Imposing An Unmanageable Closure Order Cycle -- Adopt a pattern termination procedure that permits improvements in the underlying cause to terminate the pattern of closure orders.

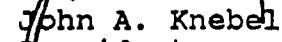
We believe our suggested revisions will better provide for compliance with Congressional intent if MSHA adopts a pattern regulation: first to improve safety; and second to focus pattern enforcement on "those few recalcitrant operators who repeatedly thumb their noses at the law" (legislative history at 1007). To do otherwise would be a misapplication of the law and serve neither a useful nor appropriate purpose.

Together, we can make great strides as we reach for our ultimate objective, a fatality-free work environment. Misapplication of a "pattern" rule would disrupt our efforts and would frustrate, rather than further, our common objective.

Sincerely,

  
Richard L. Lawson  
President  
NCA

  
Joseph P. Brennan  
President  
BCOA

  
John A. Knebel  
President  
AMC

## PART 104 - PATTERN OF VIOLATIONS

(Note: Additions are indicated by underscoring)

### SECTIONS:

- 104.1 Purpose and Scope.
- 104.2 Definitions.
- 104.3 Initial Screening.
- 104.4 Pattern Criteria.
- 104.5 Applicable Enforcement Actions.
- 104.6 Issuance of Notice.
- 104.7 Termination of Notice.

Authority: 30 U.S.C. 814(e), 957.

### § 104.1 Purpose and Scope.

This part prescribes the criteria and procedures used by MSHA to determine whether a pattern of significant and substantial violations of mandatory safety and health standards exists at a mine or a portion of a mine for purposes of Section 104(e) of the Federal Mine Safety and Health Act of 1977 (Act). It addresses mines where recalcitrant operators habitually allow the recurrence of violations of mandatory safety or health standards, which significantly and substantially contribute to the cause and effect of mine safety or health hazards. The pattern of violations enforcement tool is intended to be applied only to the few recalcitrant mine operators who are chronic violators of the law and who have not responded to the use of the other enforcement tools available to MSHA under the Act.

### RATIONALE:

We commend MSHA for the addition of this section in the proposed rule. There are, however, additions that are absolutely essential to clarify this important provision and conform it to the Congressional intent. Our proposal incorporates Congress' intent that the pattern provision be limited in scope to those few recalcitrant operators (of a particular mine) that are not responding to the other enforcement tools already available to MSHA.

MSHA correctly states in its Background comments to the proposed rule that "The legislative history of the Mine Act emphasizes that the provisions of section 104(e) are intended for use at mines with a record of repeated S&S violations and where the other enforcement provisions of the statute have not been effective in bringing the mine into compliance with Federal health and safety standards." (54 FR 23156) [emphasis added]

MSHA further states in the discussion of the Purpose and Scope of the standard that "The description of the objectives and concerns of the lawmakers who enacted the statute makes it clear that the pattern of violations enforcement provisions are directed at the few mine operator who have a history of repeated S&S violations, indicating that they habitually permit such violations to occur" (54 FR 23157) (emphasis added).

The legislative history indicates that the pattern enforcement tool was intended to be used: (1) when "there exists a serious safety and health problem at the mine" (legislative history at 621); and (2) against "those few who repeatedly thumb their noses at the law" (i.e. the recalcitrant) (legislative history at 1077) (emphasis added).

MSHA has recognized that the legislative history supports an application of the pattern provision that is limited to the few recalcitrant mine operators who have not responded to the other enforcement tools provided by the Act. The language of the standard itself should reflect that recognition to make clear that any other application of this provision would be inappropriate. The pattern provision is intended to be an enforcement tool of last resort and must not be the subject of vague regulatory provisions. Therefore, we urge MSHA to adopt our recommended addition to this Section to insure the appropriate use of the pattern of violations enforcement tool.

#### S 104.2 Definitions.

(1) Significant and Substantial - A violation is "significant and substantial" if there is a reasonable likelihood that an injury or illness will occur as well as a reasonable likelihood that the injury or illness will be reasonably serious or fatal. The authorized representative of the Secretary will analyze the hazard created by the violation by examining: (i) the hazard that the cited standard was intended to prevent; (ii) the events that must occur to create exposure to such hazard; (iii) the likelihood of the occurrence of these necessary events; and (iv) the likelihood that the occurrence of such events will result in a reasonably serious injury or illness. For violations of health standards, some of the factors that must be evaluated are: the toxicity of the specific substance tested; the variability and accuracy of the sampling instrument and the analytical methods utilized; the time and extent of exposure; the applicable standard; and, the use of personal protective equipment or administrative control. Coal dust exposure violations based on designated occupation samples are presumed to be significant and substantial. The presumption can be rebutted by a lack of personal exposure (e.g. respirators or administrative controls).

(2) Unwarrantable Failure - A violation is the result of an unwarrantable failure to comply if it results from aggravated conduct constituting more than ordinary negligence.

**RATIONALE:**

We recommend adding Section 104.2 to accommodate two essential definitions. First, we strongly recommend that MSHA use this rulemaking procedure to adopt the definition of the term "significant and substantial" provided by the Commission in Secretary of Labor, MSHA v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); and second, the definition of "unwarrantable failure" provided by the Commission in Emery Mining Corporation v. Secretary of Labor, MSHA, 12 FMSHRC 1997, 2004 (December 1987).

MSHA in its Background comments referred explicitly to the "definition" of S&S in National Gypsum (54 FR 23156 and 23157). We request that the intent of MSHA's preamble language be adopted by the specific inclusion in the standard itself of the above definition for S&S. Such an incorporation is consistent with MSHA's adoption of National Gypsum in the civil penalty standards, 30 CFR §100.4, and is necessary to provide needed guidance to inspectors, regulated parties, and even Review Commission and court judges. The adoption and incorporation of the National Gypsum and Emery definitions would prevent future attempts at circumventing both of these logical definitions and insure the integrity of the Act's graduated enforcement scheme, particularly the statutes most severe sanction, a pattern of violations notice.

In National Gypsum, the Commission issued its general test for determination of significant and substantial violations:

[A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (3 FMSHRC at 825)

This language is reflected in the first sentence of the "significant and substantial" definition that we have submitted. The case and the suggested definition requires that inspectors utilize their independent judgment to examine the facts and circumstances surrounding a violation to determine whether or not a violation presents a reasonable probability of a reasonably serious injury or illness.

With the exception of respirable coal dust violations, the definition applies equally to safety and health violations, and requires independent findings by the inspector of both the reasonable probability of: (1) the occurrence of an injury or an illness; and (2) that the injury or illness would be of a reasonably serious nature. See Secretary of Labor, MSHA v. Union Oil Company of California, 11 FMSHRC 289 (March 1989).

The Review Commission further discussed the elements that establish, under National Gypsum, whether a violation of a mandatory safety standard is significant and substantial in Mathies Coal Co., 6 FMSHRC 1 (January 1984), which it stated:

[T]he Secretary...must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC at 3-4 (footnote omitted).)

This language is reflected by the four elements noted in the second sentence of the definition that we have submitted.

The third sentence of the definition is essential in order to clearly identify the factors that must be evaluated for violations of a health standard. The following support the inclusion of this sentence:

- o Some components of the same substance have different bio-availability, and, hence toxicity (e.g. lead and lead sulfide);
- o Recent studies have demonstrated and confirmed the time spacial variability of dust exposure in the dynamic mining environment (e.g. Regulatory Implications of Respirable Silica Variability in Underground Coal Mines, Jacqueline M. Villnace, IHIT, January 13, 1989) (unpublished);
- o Grab or instantaneous samplers may be subject to interfering elements and have a differing degree of accuracy than other sampling methods;
- o The analytical and sampling methods utilized must be as close as possible to those used in the dose-response curves from which epidemiologic conclusions were reached.

In Consolidation Coal Co. v. FMSHRC, 829 F.2d 1071 (D.C. Cir. 1987), and more recently in the March 31, 1989, Union Oil decision, the Review Commission addressed violations of mandatory health standards. As MSHA notes in its Background comments to the proposed rule (54 FR 23156), in Consolidation, the Commission applied the Mathies, supra, framework to violations of mandatory health standards:

Adapting this test to a violation of a mandatory health standard...results in the following formulation of the necessary elements to support a significant and substantial finding:

(1) the underlying violation of a mandatory health standard; (2) a discreet health hazard -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. (8 FMSHRC at 897.)

This language is reflected in the fourth sentence of the recommended definition. In Consolidation, the presumption that violations of the respirable dust standard are significant and substantial was based on the Mine Act's extensive legislative history and scientific evidence supporting the presumption. However, this presumption is limited to coal dust.

In its Union Oil Company decision, the Commission rejected the contention that all air contaminant violations are presumptively significant and substantial. Determination as to whether exposure to a particular air contaminant is significant and substantial must be made on a case-by-case basis, by considering all the relevant toxicological considerations.

Inclusion of a definition of S&S in the standard is important to ensure appropriate and consistent enforcement of MSHA standards in the future, and to assist inspectors in independently evaluating each violation to determine whether the circumstances meet the S&S violation criteria. The definition of the term "significant and substantial" has been misapplied to safety violations and has been essentially ignored with respect to health violations. MSHA's current policy has led to vastly differing applications by different MSHA districts. Indeed, the agency's own statistics, which follow, document the problem and, what many would argue to be discriminatory application. We would note that while the following table focuses solely upon FY88 a similar trend continues to exist in FY89.

#### Significant & Substantial Violations FY88

##### COAL

<u>District</u>	<u>S&amp;S Cited</u>	<u>% of Total</u>
1	681	53.5
2	13,985	84.2
3	11,685	84.2
4	14,717	68.7
5	6,512	55.4
6	10,862	67.8
7	10,869	53.6
8	3,692	59.9
9	5,245	68.7
10	2,782	77.8
	<u>81,030</u>	<u>68.3</u>

METAL/NONMETAL

<u>District</u>	<u>S&amp;S Cited</u>	<u>% of Total</u>
N. Eastern	1,783	51.6
S. Eastern	2,936	30.3
N. Central	2,468	33.9
S. Central	3,827	44.1
Rocky Mountain	2,016	35.6
Western	<u>3,129</u>	<u>29.6</u>
	<u>16,159</u>	<u>35.6</u>

These percentages contrast sharply with the 1982-1983 national average that ranged below 20% in metal and nonmetal and 30% in coal.

As an additional measure to promote more consistent application of principles for determining what violations are S&S [in accordance with MSHA's expressed desire (54 FR 23157)], we strongly urge MSHA to modify its citation form to replace the "S&S" checkbox. The "S&S" checkbox citation form has often led to the rote marking of citations, without the analysis required by the Commission. A modification of the citation form to require narrative responses in place of the checkbox would promote more thorough inspector analysis of S&S findings. See attached suggested form.

Therefore, we recommend the regulatory adoption of language consistent with Review Commission decisions and the modification of the citation form as steps toward appropriate and consistent enforcement.

The second recommended definition for the term "unwarrantable failure" is fundamental to this rulemaking. In Emery, the Commission defined the term "unwarrantable failure" as used in Section 104(d) of the Mine Act:

... unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. (12 FMSHRC at 1997)

This language is reflected in the unwarrantable definition that we have submitted. Adoption of this definition in the pattern of violations regulations is essential, if unwarrantable failure sanctions are to assume their intended place in the Act's enforcement scheme.

Misapplication of this definition has led to vastly differing enforcement by the various MSHA districts and subdistricts. Indeed, the following MSHA statistics clearly indicate a misunderstanding or misapplication of the Emery decision by the agency.

104(d) Citations and Orders

<u>Calendar Year</u>	<u>Coal</u>	<u>Metal/Nonmetal</u>
1987	2739	86
1988	4383	236

Notwithstanding the Commission's decision limiting unwarrantable findings by changing the standard from "any" negligence to "high" negligence, the number of unwarrantable failure citations has nearly doubled in coal and tripled in metal and nonmetal. The inappropriateness of these increases is evidenced by a review of recent Commission decisions. During the post Emery timeframe, January 1988 to July 1989, the Commission and its ALJs reversed 63% of the unwarrantable findings addressed by them.

Regional differences complicate the problem. During calendar year 1988 the Morgantown subdistrict issued 876 104(d) citations and orders to coal operators while the Pikeville subdistrict office issued only 47. A similar circumstance arose when during 1988 the Western District issued 83 104(d) citations and orders to metal/nonmetal operators while the Northeastern District issued one.

The drastic increase in the number of 104(d) citations and orders issued from 1987 to 1988 (expected to continue in 1989), when contrasted with a tightening of the definition, the fact that 1988 was the safest year in the mining industry's history, and the Commission's overwhelming rejection of MSHA unwarrantable findings, illustrates the misapplication of the Commission's definition of unwarrantable failure. Also, the statistics illustrate the disparity between the various coal subdistricts, and metal and nonmetal districts.

While these standards are not written to address inconsistent enforcement, it must be either accounted for or corrected before applying the pattern of violations standard. Therefore, we strongly recommend the regulatory adoption of language consistent with the Review Commission decisions. A pattern of violations standard without the recommended definitions would fail to define prohibited activity and would be arbitrary and capricious.

#### S 104.3 Initial screening.

- (a) At least once each year, the appropriate Administrator shall review the compliance records of each mine and each independent contractor for the current twelve (12) month period, compared to the preceding twelve (12) month period to identify potential pattern violators.
- (b) MSHA's review shall be accomplished by examining the computer records for the mine identification

number of the operator, or contractor, for evidence of reckless disregard of the law or intentional or willful misconduct associated with repeated significant and substantial violations of mandatory health and safety standards.

- (c) Factors evidencing such potential pattern violators are:
- (1) Repeated Section 104(a) or (d) significant or substantial violations issued with findings of reckless disregard or intentional or willful conduct; and
  - (2) Repeated Section § 104(b) closure orders resulting from a failure to abate Section 104(a) significant and substantial violations; and
  - (3) Repeated Section 107(a) imminent danger closure orders, issued in conjunction with enforcement actions described in (1) or (2) above.
- (d) After the computer screening for potential pattern violators, the initial screening stage shall include a determination of whether there were any extenuating circumstances beyond the operator's control that may have resulted in the identification of the potential pattern violator. Such factors shall include:
- (1) Adverse and unexpected mining conditions;
  - (2) Enforcement actions issued against the pattern candidate identification number but caused in whole, or in part, by another entity (i.e. an independent contractor); and
  - (3) Any other factors that may mitigate either the evidence of recalcitrance or the severity of the risks posed by the hazards associated with the enforcement actions in the operator's history.
- (e) If the Administrator's examination of the initial screening criteria (a)-(d) reveals the repeated presence of each section (c) factors and demonstrates a pervasive and continuing or increasing compliance problem, then the Administrator shall institute a further review pursuant to Section 104.4.

RATIONALE:

Our recommended addition of "the appropriate Administrator" in the first sentence of section 104.3, is necessary to identify the MSHA official responsible for the review of each mine on an annual basis. The Administrator has access to all the enforcement data necessary for the initial screening in Section 104.3, and for the application of the pattern criteria in Section 104.4. The severe consequences that can result from the review demand that the initial screening be made by the Administrator. The Administrator would be in a position to provide an independent unbiased determination, whereas, a determination by a field official could be based on incomplete data, and may involve some regional bias.

Our recommended addition of the phrase "for the current 12 month period compared to the preceding 12 month period" is consistent with MSHA's preamble intent to examine a mine for 24 months (54 FR 23158). Adoption of this intent in the regulations is necessary to appropriately define and limit the period of review. Due to continual mine development, dramatic changes in mining conditions, and differing MSHA policies and enforcement emphasis, a review period of more than two years would not accurately reflect the compliance record of a mine.

Paragraph (b) is a viable method for MSHA to conduct the initial screening and it will permit the agency to "see" beyond the more than 100,000 S&S violations that can be expected in FY 1990, and identify potential pattern candidates for further review in section 104.4, pattern criteria. The recommended addition of the phrase "mine identification number of the operator, or independent contractor" is necessary to define the scope of the review. The review should be focused on each individual identification number as a separate entity. Mine operator and independent contractor enforcement activities are separate. Therefore, all review procedures leading to a pattern notice must be separated. Neither a mine operator or independent contractor should be a candidate for a pattern notice based on the recalcitrance of the other.

Section 104(e) of the Act provides MSHA with its strongest enforcement tool. Once placed on a pattern, a mine can expect a succession of closure orders that will render routine operations impossible. As a result, Congress repeatedly indicated its intent to apply the pattern provision to those "few" recalcitrant operators who have not responded to other enforcement tools.

To conform with this Congressional intent, MSHA must recognize that repeated significant and substantial violations alone are simply not enough to place a mine on a "pattern." MSHA statistics indicate that 160,300 violations were cited in 1988 and that approximately 95,000 or 60% were S&S. All large mining operations have a history of repeated S&S violations.

Furthermore, many of the "S&S" violations cited are not the result of operator actions. The courts have repeatedly held the Mine Act to be a strict liability statute, and "S&S" citations are routinely issued in "no" negligence or "low" negligence situations.

Paragraphs 104.3(c)(1)-(3) list the compliance records that the Administrator should review annually. A review and analysis of these three categories would identify those mines with serious compliance problems warranting further review. This procedure would indicate the extent to which all other enforcement tools have been used at a specific mine, and if the use of these enforcement tools has significantly increased during the current year compared to the preceding year.

Congress recognized the intensity of MSHA's enforcement activities and intended the "pattern" violator to be a mine operator whose recalcitrance results in repeated significant and substantial violations. From the perspective of Mine Act enforcement, recalcitrance is demonstrated by the use of several enforcement tools: (1) § 104(b) closure orders issued for a failure to abate a § 104(a) violation; (2) reckless disregard of the law or willful, intentional conduct resulting in § 104(a) citations or § 104(d) citations or closure orders; or, (3) § 107 imminent danger closure orders associated with violations caused by willful misconduct or reckless disregard of the law. For MSHA to apply the pattern sanction in such a manner as to capture only those "few" mine operators who "thumb their nose at the law, "only S&S violations that result from recalcitrant acts of the mine operator should be used as an initial screening device.

Our recommended changes in paragraph 104.3(d) are intended to clarify the proposal. Factors such as unpredictable geologic changes which effect ground control, methane or water inflows exemplify extraordinary situations that should be considered prior to placing a mine on a pattern notice. Also, as previously stated, a mine operator should not be a candidate for a pattern notice based on the recalcitrance of other parties.

Our recommended addition of paragraph (e) in § 104.3 will give the Administrator guidance in evaluating the results of the initial screening, and in promoting consistency in the use of the pattern provision. The provision requires that an operator evidence potential recalcitrance according to each listed factor, prior to the application of pattern criteria under section 104.4. Failure to adopt this paragraph would be arbitrary and capricious, because of its denial of due process resulting from the regulation's failure to define prohibited conduct.

#### § 104.4 Pattern Criteria.

(a) The following four criteria, for which an affirmative finding on all would be required, shall be used to identify a mine, a part of the mine, or a specific hazard with a potential pattern of violations:

(1) The accident experience, as provided in 30 CFR Part 50.2(h), at the mine demonstrates a serious health and safety problem and a significantly deteriorating trend.

(2) A direct correlation between the violations and orders examined in the initial screening process and the accidents at the mine.

(3) There is strong evidence of an operator's lack of good faith in its safety and health efforts, demonstrating the recalcitrance of the operator.

(4) A history of repeated significant and substantial violations of mandatory health and safety standards caused by the operators' unwarrantable failure to comply along with a current unwarrantable failure cycle in effect at the mine.

(b) In making any affirmative finding, the Administrator must find the presence of the factors in each of the above categories and must specify, with particularity, supported by documented evidence, the reasons for his finding in each of the above categories.

RATIONALE:

Our recommended changes to this section are crucial. The few mines identified by the initial screening process should be analyzed according to criteria that would further identify a potentially recalcitrant operator. Congress recognized that only a few mines were being operated in a manner that necessitated the use of the patterns of violations provision.

Our recommended addition in Section 104.4(a) of the phrase "for which an affirmative finding would be required" is essential. The severity of a notice of a pattern of violations, demands that an affirmative finding be required for each criteria.

We also recommended the addition of the phrase "a part of the mine, or a specific hazard" in paragraph 104.4(a). This permits a focused pattern notice (and termination thereof) based on a particular part of the mine or hazard in the mine (i.e. belt entries, haulage, etc.).

The first two criteria from the MSHA proposal, paragraph 104.3(a)(1) (history of repeated significant and substantial violations of a particular standard) and (a)(2) (history of repeated significant and substantial violations of standards related to the same hazard) would be indicative of any mine, other than a new mine. These two criteria were incorporated in the concept of our recommended initial screening process, but strengthened by requiring that they be caused by recalcitrance. We agree with MSHA's proposed criteria that incorporates unwarrantable failure enforcement actions prior to the institution of

a pattern. However, we have clarified MSHA's proposal to require a current unwarrantable failure cycle to be in effect at the mine.

With our suggested changes, the pattern criteria could be used to evaluate successfully the mines identified through initial screening to determine the few mines, if any, that may be recalcitrant due to their lack of response to other enforcement tools already available.

An analysis of our four recommended criteria (paragraphs 104.4(a)(1)-(4)) would provide the proper tools to identify a potential recalcitrant operator. The recommended changes to the pattern criteria would separate the concerned operators that may be experiencing a compliance problem, from the few (if any) recalcitrant operators. A mine operator that is already responding and cooperating with MSHA to correct the problem at the mine should not be identified as a candidate for a notice. Such a notice would be contrary to the legislative intent and disruptive and counter-productive.

The recommended addition of paragraph 104.4(b) is essential. The severe ramifications of a potential pattern of violations notice upon an operator demand a well-documented and specific finding by the Administrator. It is imperative that the mine operator be given notice of the specific shortcomings identified by MSHA so that these areas can be addressed and corrected. Further, findings by the Administrator may provide the guidance that is necessary to institute a program to avoid repeated significant and substantial violations.

#### § 104.5 Applicable Enforcement Actions

Only final citations and orders, issued after the effective date of these regulations and within 24 months prior to the initial screening, shall be used to identify mines with a potential pattern of violations in sections 104.3 and 104.4.

#### RATIONALE:

We agree with the MSHA proposal that only final citations and orders should be used to identify mines with a potential pattern of violations under Section 104(e) of the Act.

We insist, however, on the addition of the phrase "issued after the effective date of these regulations" in paragraph (c). Prospective application is a consistent element of all MSHA regulatory changes, and is necessary to achieve fairness and due process. Furthermore, earlier in our comments, we demonstrated vast regional enforcement differences that emphasize the need for uniform enforcement to ensure fair pattern application. We note that the vast majority of citations and orders have been accepted by operators on the basis of a business decision that weighs the cost of appeal against the payment of the fine. Although we recognize that such paid citations and orders are in fact final

orders of the Review Commission, their use to support a pattern notice may not have been a factor in the operator's past evaluation of whether or not to challenge these enforcement actions.

**§ 104.6 Issuance of Notice.**

(a) When a potential pattern of violations is identified, the Administrator shall notify the District Manager and provide him with all supporting material. The District Manager shall notify the mine operator in writing by certified mail and forward the supporting materials. A copy of the notification and all supporting materials shall be provided, by MSHA, to a mine employee who is the representative of miners at the mine. If there is no representative of miners, the notice shall be posted on the mine bulletin board. The notification shall specify the basis for identifying the mine, part of the mine or specific hazard involved as having a potential pattern of violations and give the mine operator a reasonable opportunity, not to exceed 30 days from the date of notification, to

(1) Review all documents upon which the pattern of violations evaluation is based.

(2) Provide additional information.

(3) Submit a written request for a conference with the District Manager. The District Manager shall hold any such conference within 30 days of a request. The representative of miners at the mine shall be afforded an opportunity to participate in the conference.

(4) Institute a program to avoid repeated significant and substantial violations at the mine, part of the mine, or the specific hazard involved in the potential pattern. The District Manager shall allow an additional period of 90 days after the conference for determining whether the program effectively reduces the occurrence of significant and substantial violations at the mine, a part of the mine, or for the specific hazard involved. The representative of miners shall be provided an opportunity to discuss the program with the District Manager.

(b) After the operator's response pursuant to subsection (a), if the District Manager believes that a potential pattern of violations exists, he shall prepare a report that fully evaluates any additional information provided, any conference held, and the program initiated by the operator, along with the District Manager's recommendation. A copy of the report shall be provided to the mine operator and representative of the miners at the mine. Both parties will have 30 days from receipt

of the report to submit written comments to the District Manager. The District Manager will send his report and the comments on the report and all supporting materials to the Administrator and this will constitute the entire record.

(c) Within 30 days of receipt of the report from a District Manager, the Administrator shall forward the report and comments, with his recommendations and all supporting materials, to the Assistant Secretary of Labor for MSHA who shall make a decision as to whether or not the mine or a part thereof is to be issued a notice of a pattern of violations. A decision to issue a section 104.6 notice and justification thereof shall be provided, by certified mail, to the operator and the representative of the miners. The decision of the Assistant Secretary shall become final upon the 30th day after it is served on the operator and representative of miners, unless a request for a conference has been filed. The Assistant Secretary shall hold any such conference and issue a final determination within 30 days of such request.

(d) The mine operator shall post all notifications, issued, under this part, at the mine.

RATIONALE:

Our suggested revisions to §104.6 incorporate consistent timeframes throughout the process and provide a reasonable opportunity for all parties to review, and comment upon, the documents considered in determining whether a pattern exists.

We support the concept contained within paragraph 104.4(a)(4) of the MSHA proposal. This provision will allow the operator the opportunity to initiate a program to avoid repeated significant and substantial violations at the mine, prior to the issuance of a pattern of violations notice.

Our modification to paragraph (b) would afford the mine operator, and the representative of the miners, an important opportunity to respond to the District Manager's report, before it is sent to the Administrator. The Administrator's recommendations to the Assistant Secretary will be very influential, therefore, the principle of equity should apply and he/she should receive all the relevant information at one time. As proposed by MSHA, the Administrator would receive the District Manager's report first, thereby creating the opportunity of a predisposed decision before the comments arrive. As a matter of fairness, all the relevant information should be available to the Administrator at the same time, so that an equitable decision can be made based on all the arguments.

The legislative history indicates that the final decision to issue a pattern of violations should be made by the Secretary of Labor (Legislative History at 1979). We recognize that this may

be impractical, therefore in paragraph (c) we recommend that the final determination as to whether a mine shall be placed on a pattern of violations cycle be rendered by the Assistant Secretary, rather than the Administrator. The significance of this determination, considered to be the most severe method of enforcement, mandates that the decision rest with the Assistant Secretary, the highest ranking official of the agency. Likewise, because of the severe sanctions a pattern notice encompasses, a final appeal must be incorporated within the standard to allow due process. The opportunity for a conference with the Assistant Secretary before a final determination is essential. This would afford all the interested parties the opportunity to arrive at a solution, before the issuance of a pattern of violations notice. This would comport with the legislative history, by forcing the few recalcitrant mine operators to either address the problem at the mine, or if they continue to "thumb their noses at the law," a pattern of violation notice would be issued.

**S 104.7 Termination of Notice.**

(a) Termination of a Section 104(e)(1) pattern of violations notice shall occur when an inspection by MSHA results in no significant and substantial violations of mandatory health and safety standards issued: (1) at the mine; or (2) the portion of the mine involved in the pattern; or (3) for the hazard involved that resulted in the pattern; or (4) 90 days after the issuance of the pattern if no S&S violations are issued in any of the three categories described herein.

(b) The mine operator may request an inspection of the entire mine, or portion of the mine, or for the hazard involved in the pattern. Personnel from a different field office or district shall perform the inspection if requested by the operator. No advance notice of the inspection shall be provided, and the scope of inspection shall be determined by MSHA, which shall be no less than that requested by the operator. Partial mine inspections covering the entire mine within 90 days shall constitute an inspection of the entire mine for the purposes of this part.

**RATIONALE:**

Our recommended modifications to paragraph (a) are consistent with our recommendations to the previous sections. This will allow MSHA and the mine operator to focus their efforts on the particular part of the mine or hazard that has resulted in the issuance of the notice. The purpose of Section 104(e) is to improve compliance at a mine identified by MSHA as having a pattern of noncompliance. Paragraph (a), with our recommendations will accomplish this purpose, in a fashion that permits focused attention on the source of the pattern. By focusing the use of § 104(e) both MSHA and the operator will encourage reform of the problems leading to the pattern and be provided with a reasonable

mechanism to terminate the pattern once the underlying problem is solved.

In paragraph (b) we have recommended that the operator have the option of requesting an inspection of the mine by personnel from a different field office or subdistrict. Because of the severe sanctions imposed on the mine operator by a pattern notice, the relationship between the operator and the local inspectors could become severely strained. Further, it can be assumed that local inspectors concurred in establishing a pattern at the mine, therefore, an opportunity for an independent evaluation should be available to the operator. Our recommendations would enhance due process thus avoiding misapplied severe sanctions inherent in a pattern of violation notice. The statute provides MSHA with "broad authority" to issue regulations deemed "necessary to establish criteria for determining when a pattern" exists. MSHA must exercise this authority so that the use of the pattern provision serves the statutory goal of improved safety, without unnecessary closures after the safety objective has been achieved.

Attachment

Delete the significant and substantial check box from the citation form.

Replace the check box with the following series of questions for use in determining whether a citation is S&S:

- (a) What hazard was the standard intended to prevent?

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- (b) What events must occur to create exposure to the hazard?

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- (c) What determines the likelihood of the occurrence of the events?

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- (d) What determines the likelihood that the events will or will not result in a reasonably serious injury or illness?

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- (e) Based on the above analysis, I conclude:

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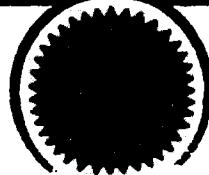
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**United Mine Workers of America**



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AREA CODE (202) 843-7200

UNITED MINE WORKERS' BUILDING  
**Washington, D.C.**  
20008

**MEMORANDUM**

**DATE: AUGUST 31, 1989**

**TO: LINDA RAISOVIC-PARSONS**

**FROM: MARY LU JORDAN**

**RE: UMWA COMMENTS ON MSHA'S PROPOSED RULES FOR CITING  
A PATTERN OF VIOLATIONS**

Attached are the comments regarding MSHA's proposed regulations that I have filed today on behalf of the UMWA.

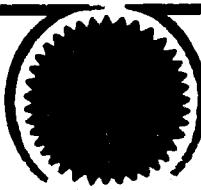
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**cc: Robert Stropp  
Joe Main  
Bob Scaramozinno**

# United Mine Workers of America

LEGAL DEPARTMENT

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August 31, 1989

Ms. Patricia Silvey  
U.S. Department of Labor  
Mine Safety and Health Administration  
Office of Standards, Regulations & Variances  
4015 Wilson Boulevard - Room 631  
Arlington, Virginia 22203

Dear Ms. Silvey:

This is in response to the notice published in the May 30, 1989 Federal Register. The United Mine Workers of America wholeheartedly supports MSHA's long overdue decision to develop regulations for implementing section 104(e) of the Federal Mine Safety and Health Act of 1977. Our comments are as follows:

### Section 104.2 Initial Screening

The proposed rule requires that the compliance record of mines be reviewed at least once each year for indications of a pattern of violations. The UMWA does not feel that an annual review is frequent enough. This review should be required at least bi-annually, if not quarterly. Mines with a chronic history of persistent dangerous violations could continue to operate for an entire year before any action would be taken to restore the mine to a safe and healthful condition. This is far too much time to permit a potentially disasterous operation to continue unchecked.

Paragraphs (b)((2) and (4) of this section should be eliminated. The operator's lack of good faith and the existence of mitigating circumstances should not be factors considered prior to the issuance of a Section 104(e) notice. The Senate Committee report clearly states

Congress' wish that intent or state of mind of the operator not be criteria for determining when a pattern of violations exists. S. Rep. No. 95, 95th Cong. 1st Sess. 33 (1977). Accordingly, the operator's good faith, absence of negligence, knowledge and any extenuating circumstances should not be factored into the Agency's review. If a review of the citation history indicates a pattern of S&S violations, a notice should be issued, without inquiry into the state of mind of the operator or the existence of mitigating factors. Certainly the issuance of numerous S&S citations, should be enough to alert an operator about a health and safety problem at this mine and present him with the need to take corrective action.

#### Section 104.3 Pattern Criteria

Contrary to the expressed intention of Congress, MSHA has narrowly limited the situations that would trigger issuance of a pattern of violations notice. The Senate Report clearly indicates that this enforcement mechanism was not to be limited only to violations of the same standard, nor to violations which are the result of an operator's unwarranted failure to comply. In spite of this expressed intention by Congress, MSHA has incorporated these limitations in two of the criteria used to identify a pattern of violations. The third criteria is limited to a "history of repeated significant and substantial violations of standards related to the same hazard." Nowhere is there a mechanism for triggering a pattern notice at a mine that has had a history of significant and substantial violations, where the violations relate to different standards or different hazards and are not unwarrantable.

MSHA, of course, should have the ability to issue a pattern notice where the history of violations relates to the same standard or the same hazard, or where the violations are caused by an unwarrantable failure to comply. MSHA, should not be restricted to those situations however. This section of the regulations should be amended to include a criteria that would identify mines with a history of significant and substantial violations. Congress clearly expected MSHA to have the ability to issue a pattern notice where there is a history of significant and substantial violations even if the violations are related to different standards or different hazards, and even if the violations do not meet the criteria for an unwarrantable failure violation. In addition, the regulations should clarify the fact that it

is not necessary to meet all the criteria specified. A mine meeting any one of the criteria (including simply a history of significant and substantial violations) would be subject to a pattern notice.

In addition to the criteria outlined in paragraph (a), MSHA should also consider whether the mine under review has been notified of a potential pattern in the past. If such a mine falls into a gray area regarding whether a pattern exists, MSHA must give due consideration to the fact that the mine has had a pattern of violations in the past. This fact should substantiate the view that the mine has serious health and safety problems.

Paragraph (b) of this section of the proposed rule provides that only final citations and orders will be considered when identifying mines with a potential pattern of violations. The UMWA vehemently opposes this proposal.

If MSHA restricts itself to final citations and orders when identifying mines with a potential pattern, operators will be strongly motivated to challenge every S&S citation they are issued, regardless of the merits of their position. If MSHA waits until the legal challenges are exhausted then MSHA will be trying to determine whether a pattern exists on the basis of conditions that were cited several years previously. Moreover, by filing legal challenges, operators will be able to escape any liability under sec. 104(e), even though the citations and orders are ultimately upheld. This is because MSHA, in considering the mine's history, will probably wind up limiting itself to a certain time frame, i.e. 1 or 2 years. It would certainly be easy enough for a operator to challenge S&S citations, and keep their validity in limbo for that period of time. Once the time period that MSHA used had passed, the operator could safely drop its challenge. The operator would know that even though the citation was now final, it would be too old to be included in an assessment for a pattern notice.

Requiring a sec. 104(e) order to be based only on "final" citations and orders is completely contrary to the rest of the Act's enforcement scheme. A failure to abate order under sec. 104(b) or an unwarrantable failure order under sec. 104(d) are each issued on the basis of previous citations, whether or not those citations have been challenged. Likewise, an operator who disputes an inspector's determination as to whether an imminent danger exists must comply with the sec. 107 order, while he challenges its issuance.

There is absolutely nothing in the legislative history which supports such a different and restrictive approach to the application of sec. 104(e) - indeed the legislative history requires the opposite conclusion. In discussing the sequence for issuing a sec. 104(e) order the Senate Committee noted that the pattern order sequence "parallels the current unwarrantable failure sequence of the Coal Act and the unwarranted failure sequence of sec. 105(c) of the bill.<sup>1/</sup> If pattern orders can be based only on "final" citations, its enforcement cannot be said to "parallel" that of sec. 104(d) as Congress intended.

The Committee gave a fairly extensive comparison between the unwarrantable and the pattern order provisions. They explained that the violation which sets into motion the unwarranted failure sequence "must be of a significant and substantial nature and must be the result of the operator's unwarranted failure to comply." In comparison, they pointed out that "there is no requirement that the violations establishing the pattern offense be a result of the operator's unwarranted failure only that they be of a significant and substantial nature." The Committee goes on to describe other ways in which the enforcement provisions parallel each other including the 90 day period for issuance of either order and the requirement of an intervening "clean" inspection before either order can be terminated.

The Committee concludes its discussion by pointing out that 'it is the Committee's intention that the Secretary or his authorized representative may have both enforcement tools available and that they can be used simultaneously if the situation warrants.' (Emphasis added). Under MSHA's proposed rule Congress' intention would be completely thwarted. The Secretary could hardly use both enforcement tools simultaneously if an operator's challenge to the underlying citations effectively blocked implementation of one of those tools.

#### Section 104.4 Issuance of Notice

Section 104.4 establishes guidelines for a review and conference with the District Manager when a pattern notice

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<sup>1/</sup> Sen. Rep. supra at 33. The reference to sec. 105(c) is a reference to the unwarrantable provision which was ultimately designated as sec. 104(d) in the final bill.

is issued, to provide opportunities for input from mine operators and the miners representative. The citations and orders issued to an operator for repeated S&S violations of standards provide the operator with ample warning of a potential pattern notice. This should signal that serious health and safety problems exist and that a course of action is needed to improve the mine's violation record. If the operator and miner's representative are permitted to provide additional input regarding the information upon which the pattern notice is based, they should do so through written comments, with copies provided to all parties. An opportunity for a conference as provided in the proposed regulations discriminates against miners' representatives, unless such representative is protected against loss of pay.

Such a conference is currently provided by 30 CFR Section 100.6 for review of citations and orders. Although our miners' representatives are afforded an opportunity to participate, they are usually unable to do so. This is because pay is generally not provided to miners representatives for attending these conferences. The conferences requested by mine operators are very frequent and many local unions are not financially solvent enough to pay lost wages for representatives to attend these events so often. This normally leaves the conferences open to the operators' attempts to influence and pressure MSHA to vacate citations and orders. To provide another conference procedure for review of a pattern of violation notice would more than likely result in the same situation. The Union therefore recommends that any input be reduced to writing to provide a fair balance to the procedure unless, as a precondition to requesting a conference, the operator agrees to reimburse the miners' representative for any lost wages.

The Union recommends further that any mine identified as having been subject to a pattern notice in the past should not be afforded the opportunity for further input regarding the information on which a subsequent notice is based. These mines should be subject to an automatic pattern of violations notice if the criteria is met because they have exhibited a continued disregard for the health and safety of miners.

The proposed rule allows the District Manager 120 days to submit his report to the administration. The proposed rule doesn't state whether this 120 day period applies even if the District Manager has not allowed the operator the maximum 90 day period for implementing a program

designed to avoid repeated significant and substantial violations. If the operator has not implemented such program, or been given a shorter time for implementing such program, then 120 days is inappropriate. The rules, however, do not provide for a time frame in such situations.

The rules also do not provide any indication of how a program will be determined to have "effectively reduce[d] the occurrence of significant and substantial violations at the mine." There is a tremendous potential for abuse by operators and/or District Managers under this provision. A mine which has been identified as having serious problems could never come under the enforcement mechanism set out in section 104(e), simply on the basis of the District Manager determining that a program has effectively reduced the occurrence of significant and substantial violations. The proposed regulations require the District Manager to submit a report if he "continues to believe that a potential pattern of violations exists at the mine ...." The proposed regulations require no report, however, if the District Manager determines that the program has effectively reduced the occurrence of significant and substantial violations at the mine. It is more important to require a report in the second situation since the regulations are so general, and do not specify what an effective reduction is. MSHA must require reports when District Managers determine that a potential pattern no longer exists, if there is to be uniformity in enforcement practices.

What happens if, during the 90-day trial period an operator continues to receive S&S citations but decides to challenge virtually all of them? Will an MSHA District Manager not count them because they are not "final" and declare there has been an effective reduction in citations?

What about the pressure that may be put on MSHA inspectors, especially during the 90 day trial period, to cite violations as non S&S? What happens if an operator improves for the 90-day trial period and then slacks off? Will MSHA start all over again, notifying the operator that there is a "potential" pattern and allowing another 90 days for fine tuning the program? Such a cycle could go on indefinitely and allow operators with a pattern of violations to escape enforcement under sec. 104(e).

Section 104.5 Termination of Notice

This section reflects the Act's requirement that once a pattern of violations notice is issued, the notice can only be terminated after an MSHA inspection of the entire mine finds no S&S violations of a mandatory safety or health standard.

Paragraph (b) recognizes partial inspections covering the entire mine over a 90-day period. The 90-day inspection is much too lengthy. Conditions in an underground mine change rapidly and variedly. Consequently, a part of the mine that was inspected and declared "clean" on day one of the inspection may be hazardous by day 90.

A complete inspection of a mine should not take more than 30 days. Therefore, the UMWA recommends that the length of time for a series of partial inspections be limited to 30 days.

Thank you for providing us with the opportunity to comment on the proposed regulations.

Sincerely,

*Mary Lu Jordan*  
Mary Lu Jordan

MLJ/ss  
OPEIU2

# United Mine Workers of America



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December 21, 1989

Ms. Patricia Silvey, Director  
Office of Standards, Regulations and Variances  
Mine Safety and Health Administration  
4015 Wilson Boulevard  
Arlington, VA 22203

Dear Ms. Silvey:

The United Mine Workers of America, Department of Occupational Health and Safety has reviewed the transcripts of the public hearings and joint comments submitted by the National Coal Association (NCA), American Mining Congress (AMC) and Bituminous Coal Operators Association (BCOA) in relation to the Proposed Rulemaking for Pattern of Violations and would like to submit the attached post-hearing comments. These comments address many issues raised in the August 30, 1989 comments submitted by the NCA/AMC/BCOA. Our post-hearing submission in response to those comments are as follows:

### S104.1 PURPOSE AND SCOPE

The comments of the NCA/BCOA/AMC recommend incorporation of language in this section that would severely restrict the issuance of a pattern of violations to a limited few operators, described as "chronic violators of the law." The UMWA does not agree that the lawmakers who enacted this statute foresaw or intended such a restrictive application. The Senate Committee clearly intended the pattern provision to be applied to any operator that exhibits a pattern of habitual violations of the Act's requirements. As example, the committee cited the conditions found at Scotia as a pattern of habitual violations of the Act's requirements which would be cited by the inspector and abated by the operator. But the operator would then permit the mine to lapse back into violation, exposing miners to these risks all over again. Such a situation could occur at any mine and would not necessarily be described as "chronic" violators.

Ms. Patricia Silvey  
December 21, 1989  
Page Two

**§104.2 DEFINITIONS**

The operators comments recommend the addition of definitions of "significant and substantial" and "unwarrantable failure" under this part. Although the UMWA recognizes that the National Gypsum and Emery decisions influence the interpretation of these terms, we do not think it necessary or appropriate to include them in the regulation. MSHA must instead rely on the legislative history and language of the Act in determining whether violations are serious enough to warrant enforcement under §104(e). The guidance provided by the Agency to inspectors in defining significant and substantial and unwarrantable failure would more appropriately be accomplished through policy, as is currently being done.

In support of this recommendation, the operators point out that the enforcement inconsistencies of S & S violations throughout the various MSHA Districts justifies a need for defining S & S in the regulation. However, the UMWA does not believe that a definition of S & S in the regulation will clarify the inconsistencies of enforcement in each MSHA District. The mere inclusion of a definition of S & S in the regulation cannot guarantee consistent interpretation throughout MSHA Districts. Instead, continual guidance from the Agency through policy and other communication modes will better achieve that end.

The UMWA agrees with MSHA's position that a definition of what constitutes an S & S violation is not appropriate or necessary for this regulation. As MSHA points out in the general discussion, the Agency has been working and will continue to work with its inspectors toward a consistent application of principles for determining what violations are S & S. This is the most logical approach to achieve consistency of enforcement. As additionally pointed out in the general discussion, prevailing case law dictates that each violation must be independently evaluated by inspectors to determine whether the circumstances meet the S & S criteria. For these reasons, the UMWA does not recommend defining these terms in the regulation.

**§104.3 INITIAL SCREENING**

The recommendation that the Administrator be the official responsible for the initial screening for a pattern of violations is unrealistic. The Administrator is charged with

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the tremendous responsibility of overseeing an Agency with thousands of employees. To expect him to do the screening of over 15,000 mines is unreasonable. Further, he would not be familiar with the history of the mine or other relevant circumstances that may factor into the pattern evaluation as would the local MSHA official.

The operators recommend that the screening period be "for the current 12 month period compared to the preceding 12 month period". Their comments indicate that this is consistent with MSHA's preamble intent to examine a mine for 24 months. However, the intent of MSHA was to examine a mine's compliance records overall for a period of two years and not to compare one to the other. Further, MSHA has justifiably retained the flexibility to examine for a longer period if necessary. As MSHA points out, interruptions in mining operations, changes in mine management, or other factors could indicate that this period should be longer or shorter.

The operators comments recommend that independent contractors violation records be evaluated separately from the mine operators. They maintain that independent contractors are separate entities and should be evaluated for their individual records and held accountable for their own actions. Although this seems reasonable, mine operators must, to some extent, retain partial liability for work performed on their property. The mine operators have the final control over any contracted work and must accept some accountability for the manner in which the operation is conducted. In this light, those violations cited to any contractor whose work is performed on mine property must be counted in the overall mine violation assessment. On the other hand, any contracted work that is performed in independent shops or location outside the mine operator's control or jurisdiction should not be counted.

Lastly, the operators recommend that only S & S violations that result from recalcitrant acts of the mine operator as demonstrated by:

- (1) 104b closure orders issued for a failure to abate a 104(a) violation;
- (2) reckless disregard of the law or willful, intentional conduct resulting in a §104(a) citation or 104(d) citation or closure order; or

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- (3) §107 imminent danger orders associated with violations caused by willful misconduct or reckless disregard of the law be considered in the pattern evaluation.

The Senate Committee who authored the bill containing the pattern provision did not intend such a restrictive application of this section. The Committee stated that their intention was that a pattern may be established by violation of different standards as well as by violations of a particular standard, and to provide an effective enforcement tool to protect miners when operators demonstrate disregard for the health and safety of miners. Their clear intent was to provide an effective enforcement provision to check repeated violations that may have serious consequences. The Committee's intent does not convey such restrictive consideration to only unwarrantable or other serious violations as the NCA/AMC/BCOA comments would lead one to believe. But rather, Congress focused attention simply on S & S violations.

#### §104.4 PATTERN CRITERIA

The criteria for identifying a pattern of violations must be focused on a mine's history of repeated S & S violations as mandated by Congress. Although other factors such as the mine accident experience should be considered, it cannot be central to determining that a pattern exists, as recommended by the NCA/AMC/BCOA. MSHA has rightfully retained the flexibility to individually evaluate each mine's compliance history along with other relative circumstances. If the Agency believes that a pattern has been established and miners safety is in jeopardy, it must be able to apply this enforcement tool without undue restrictions.

The operators proposal would require MSHA to establish a direct correlation between the mine violation history and accidents. This approach would be contrary to the intent of Congress and would be inconsistent with the preventative purposes of the Mine Act. Congress planned that 104(e) provide an effective enforcement tool to check those mines, such as Scotia, that exhibit a repeated violation pattern that could lead to disaster. The mine's accident rate does not necessarily influence the existence of a pattern and therefore cannot be a focal point in identifying mines with a pattern.

The operators comments further prescribe that a pattern notice could only be issued at a mine currently with an

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unwarrantable failure cycle in effect. This was clearly not the plan of Congress in enacting this provision. In discussing the sequence for issuing a Section 104(e) order, the Senate Committee noted that the pattern order sequence "parallels" the current unwarrantable failure sequence of section 105(c) of the bill.

The Committee gave a fairly extensive comparison between the unwarrantable and the pattern order provisions. They explained that the violation which sets into motion the unwarranted failure sequence "must be of a significant and substantial nature and must be the result of the operator's unwarranted failure to comply". In comparison, they point out that "there is no requirement that the violations establishing the pattern offense be a result of the operator's unwarranted failure only that they be of a significant and substantial nature". Hence, the Committee clearly did not intend that an unwarrantable failure sequence be a prerequisite for a pattern of violations.

#### S104.5 APPLICABLE ENFORCEMENT ACTIONS

The operators, as well as MSHA, recommends that only final citations and orders should be used to identify mines with a potential pattern of violations. As pointed out in the UMWA's earlier comments, if MSHA restricts itself to final citations and orders when identifying mines with a potential pattern, operators will be strongly motivated to challenge every S & S citation they are issued, regardless of the merits of their position. This is clearly evidenced by their comments on this section: "Although we recognize that paid citations and orders are in fact final orders of the Review Commission, their use to support a pattern notice may not have been a factor in the operator's past evaluation of whether or not to challenge these enforcement actions". This clearly supports the UMWA's prediction. If any operator felt that citations were unjustly issued, they certainly would have challenged them. This substantiates our concern that S & S citations will be challenged just to delay or impede the issuance of a pattern notice.

The UWMA maintains the position that restricting consideration to final citations and orders is not workable. If MSHA waits until all legal challenges are exhausted and citations/orders are considered final, then MSHA will be

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trying to determine whether a pattern existed on conditions cited years previously. The UMWA does not believe that this is the enforcement tool Congress foresaw. The clear intent of this provision was to promptly recognize and draw attention to developing potentially serious health and safety conditions and to restore the mine to a safe workplace. By restricting 104(e) enforcement to final citations, MSHA will be creating an effective loophole to avoid a pattern notice. By filing legal challenges, operators will be able to escape any liability under 104(e), even though those citations and orders are ultimately upheld. This is because the citation's validity could be kept in legal limbo until they become too old for consideration in an assessment for a pattern notice.

Furthermore, requiring a section 104(e) order to be based only on "final" citations and orders is completely contrary to the rest of the Act's enforcement scheme. A failure to abate order under section 104(b) or an unwarrantable failure order under section 104(d) are each issued on the basis of previous citations, whether or not those citations have been challenged. Likewise, an operator who disputes an inspector's determination as to whether an imminent danger exists must comply with the section 107 order, while he challenges its issuance.

There is nothing in the legislative history to support such a restrictive approach to the application of 104(e). For these reasons, the UWMA insists that all S & S citations/orders be considered in the evaluation for a pattern.

#### S104.6 ISSUANCE OF NOTICE

The operators proposal suggests incorporation of timeframes throughout the process that would unnecessarily delay and impede the enforcement of section 104(e). The UMWA does not feel that Congress intended such a delayed approach to 104(e) enforcement. The legislative intent clearly was to provide a prompt means of restoring a mine with evidence of developing serious health and safety problems back to a safe condition. The purpose being to prevent another disaster such as at Scotia. If the timeframes proposed by the operators is adopted, a mine could not be put on a pattern notice for a period of nine months if all avenues of review are exhausted, even though a pattern of violations have been identified. The UMWA does not think this represents the "effective enforcement tool" Congress foresaw.

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Under the operators proposal a pattern order can potentially be delayed for a total of 270 days. A summary of the procedure proposed by NCA/AMC/BCOA is as follows:

<u>DAYS LAPSED</u>	<u>PROCEDURE FOR PATTERN NOTICE PROPOSED BY NCA/AMC/BCOA</u>	
30	Paragraph (a)	Potential Pattern of Violations is identified by MSHA. The mine operator is provided 30 days to: <ul style="list-style-type: none"> <li>(a) (1) Review all documents upon which the evaluation was made.</li> <li>(a) (2) Provide additional information.</li> </ul>
+30	(a) (3)	Submit a written request for a conference with the District Manager to be held within 30 days.
+90	(a) (4)	Institute a program to avoid repeated S & S violations to be in effect for a period of 90 days after the conference outlined in (a) (3) is held.
+30	Paragraph (b)	If the District Manager continues to believe that a pattern exists, he must make recommendations to the Administrator within 30 days.
+30	Paragraph (c)	The Administrator must review all information and make his recommendation to the Assistant Secretary within 30 days.
+30		The Assistant Secretary's decision shall become final after 30 days unless a conference is requested.
+30		If a conference is requested, an additional 30 days is permitted in which to hold the conference.
<u>270 Days</u>	<u>or approximately 9 months delay possible from date that a potential pattern of violations is discovered.</u>	

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The UMWA does not think Congress intended that a potentially disasterous operation should be left unchecked for such a long period of time before any enforcement action could be taken. In contrast, we feel they foresaw and intended just the opposite - a swiftly applied, preventative, enforcement measure. This could not possibly be achieved under the operators proposal.

Another impractical recommendation under this proposal is the suggestion that the Administrator examine all mines for a potential pattern of violations. To propose that the Administrator be responsible for examining over 15,000 mines each year for a pattern of violations in conjunction with the tremendous amount of additional responsibilities he has, is unrealistic. The Agency has placed the responsibility for initial screening with the MSHA District Manager, which is most appropriate.

#### §104.7 TERMINATION OF NOTICE

The recommendation of the NCA/AMC/BCOA that a pattern of violations notice be terminated based on an inspection of only "the portion of the mine involved in the pattern" is in direct conflict with the requirements of Section 104(e)(3) of the Act. The language of the Act clearly mandates an inspection of the entire mine in which no S & S violations are found. The operators rationalize that such a provision will allow MSHA to focus their efforts on the particular part of the mine that resulted in the issuance of the notice. However, the purpose of 104(e) is to focus on S & S violations and their related hazards and not on a particular part of the mine. If MSHA restricts itself to a repeat of an S & S violation in only a section of a mine, the whole purpose of 104(e) will be defeated. The intent of a pattern notice is to prevent the recurrence of related S & S violations and hazards throughout the mine. To suggest that the focus of the provision be limited to portions of a mine is in complete conflict with the legislative history and language of the Act. Consequently, MSHA must reject such suggestions.

Lastly, the operators have recommended that a mine on the pattern notice be given the option to request an inspection of the mine by personnel from a different field office or subdistrict. Their reasoning for such a request being, "because of the severe sanctions imposed on the mine operator by a pattern notice, the relationship between the operator and

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the local inspectors could become severely strained". The UMWA does not feel that this is a good idea. The local inspectors who are most familiar with the history and attitude of the operator toward safety are the most qualified to make the final evaluation to determine if a pattern notice should be terminated. Therefore, the termination inspection must be retained at local MSHA jurisdictions.

Sincerely,

*Linda Raisovich-Parsons*

Linda Raisovich-Parsons  
Special Assistant on Legal  
and Legislative Matters

opeiu2/mm

30 CFR Part 104

1219-AB73

## PROGRAM POLICY MANUAL, VOL. III

1/11/11

**PART 104 PATTERN OF VIOLATIONS**

On October 1, 1990, regulations to identify mine operators who meet the criteria for a Pattern of Violations as outlined in 30 CFR Part 104 became effective. These regulations include procedures for initial screening of mines that may be developing a Pattern of Violations; criteria for determining whether a Pattern of Violations exists at a mine; procedures for issuance of potential pattern notice and final pattern notice; and procedures for termination of a Notice of Pattern of Violations.

**104.2 Initial Screening**

At least once every year, District personnel are to complete an initial screening of each mine in their respective districts to determine whether there is sufficient cause to apply the pattern criteria for possible issuance of a potential Pattern of Violations notice. At the discretion of the District Manager, screenings may be conducted more frequently.

The final rule does not specify the period of a mine's compliance history to be examined during the initial screening. Generally, a mine's 2-year compliance history will provide sufficient information for an evaluation of the health and safety conditions. In some cases, however, other factors such as interruption of mining activities or changes in mine ownership may suggest that a longer or shorter compliance history be reviewed.

Persons conducting the initial screening should use sources such as computer printouts identifying the mine's compliance history relative to the types of enforcement action noted in 30 CFR 104.2(a); information in mine files such as prior inspection reports and inspector's notes; special assessment and enhanced assessment action; special investigation activities; and other relevant information resulting from inspector debriefings. Only violations and orders issued after October 1, 1990, can be considered in the initial screening process.

The legislative history of Section 104(e) of the Federal Mine Safety and Health Act of 1977 does not support a distinction between large and small operations in establishing a pattern. Also, 30 CFR Part 104 avoids triggering the pattern notice based on a predetermined number of violations of particular standards. Therefore, a quantity of violations that might constitute a pattern at one mine may be insufficient to trigger a pattern notice at another mine. Accordingly, the initial screening criteria in 30 CFR 104.2 are to be applied on a mine-by-mine basis. This screening procedure shall also apply to each independent contractor's compliance history at a specific mine site. Each independent contractor at a mine site shall be screened as a separate entity. An independent contractor's compliance history shall not be collectively screened based on district or national data.

Mitigating circumstances, as referenced in 30 CFR 104.2(b)(4), means causes or circumstances resulting in repeated violations that are beyond the control of the

**30 CFR Part 104****1219-AB73**

operator, even though the operator has made a diligent effort to comply with the regulations. For example, a severe geological condition may present complex mining problems and should be given full consideration where operators have undertaken methods to control the condition but nevertheless failed to maintain compliance.

**PPOV Determinations**

*There may be extraordinary occasions when a mine meets the screening criteria by which mines are identified as exhibiting a potential pattern of violations but there are mitigating circumstances that make a potential pattern notification inappropriate. Examples of situations that would be necessary to justify not issuing a PPOV notification are:*

- Recent bona fide changes in mine ownership or management; or
- Reductions in S&S citations/orders during the final quarter of the screening review—
  - to at or near the 70% reduction goal for mines receiving a PPOV notification, or
  - to at or near the 50% reduction goal for PPOV mines that implement a corrective action programs if mine management has made identifiable health and safety program improvements that achieve the objectives of **Appendix B - Guidelines for Corrective Action Programs**.

**POV Determinations**

*In general, a recommendation to not issue a mine operator a POV notice when the mine has not met the established quantitative goals under the PPOV notice will be based on qualitative information. The types of situations that would be necessary to justify a recommendation that a mine not receive a Pattern of Violations notice or have the notice delayed to reevaluate the conditions in the mine include:*

- A bona fide change in ownership;
- A bona fide change in mine management that brought significant improvements in compliance;
- The operator does not meet S&S reduction benchmarks due to conditions outside of the operator's control and despite significant improvements in compliance due to implementation of an effective corrective action program; or
- Upon review of facts and evidence, generally occurring after the violations are contested, there are S&S violations that are modified to non-S&S, after which the operator meets the established S&S rate goals.

A record of the initial screening process for each mine is to be kept in the District until the next screening is conducted.

**30 CFR Part 104****1219-AB73****104.3 Pattern Criteria**

The pattern criteria shall be applied to mines identified in the initial screening process as having a compliance problem to determine if these mines demonstrate a potential Pattern of Violations. The objective will be to identify those operators who habitually allow the recurrence of violations. This review shall focus on the mine's history of repeated significant and substantial (S&S) violations of a particular standard, of standards related to the same hazard, or caused by an unwarrantable failure to comply. A pattern evident in any one of these categories may provide a sufficient basis for the issuance of a potential Pattern of Violations notice. It should be noted that violations used for pattern criteria are only those S&S citations/orders issued after October 1, 1990, that have become final either through the assessment process or through litigation.

**104.4 Issuance of Notice**

30 CFR 104.4 addresses two different notification processes. Section 104.4(a) relates to a District Manager's notification of a potential Pattern of Violations. Section 104.4(c) relates to the Administrator's decision on whether to issue a notice of a Pattern of Violations.

The reasons for placing a mine in a potential Pattern of Violations category must be clearly stated in a notice to the mine operator in accordance with 30 CFR 104.4(a). Factors considered in the initial screening process and Pattern of Violations criteria application should be specified in the notice. For example, merely stating that a history of repeated S&S violations of a particular standard exists may not adequately explain to the operator why the mine may be placed on a pattern. The specific standard and the number of times it has been cited should be clearly defined in the notice along with all other supporting information. Furthermore, the District Manager should advise the operator in this notice that if the operator implements a program as specified in 30 CFR 104.4(a)(4), the operator must provide a written program to the District Manager within 20 calendar days or less from receipt of the notice. The notice of potential Pattern of Violations is to be sent to the mine operator by certified mail or hand delivered. The mine operator is required to post this notice on the mine bulletin board. Additionally, a copy of the notice must be sent to the representative of miners and the Pattern of Violations coordinator in headquarters.

If a program is implemented in accordance with 30 CFR 104.4(a)(4), the District Manager may allow additional time to evaluate the effectiveness of the program. This timeframe cannot exceed 90 days, and the District Manager can terminate the evaluation period at any time if the program's purpose is not being achieved.

When notice of a potential Pattern of Violations has been sent to a mine operator, any subsequent action taken by the District Manager to rescind this notice is to be stated in a letter sent to the mine operator, representative of miners, and Pattern of Violations coordinator.

**30 CFR Part 104****1219-AB73**

If an operator resumes the practice that gave rise to the original notification of potential Pattern of Violations, a new notice can be issued to the operator based on the circumstances that resulted in the original notice, as well as the operator's most recent conduct. Under such circumstances, the District Manager would also take into consideration the operator's performance following the previous notification in determining whether to allow the operator another 90-day period to implement a program to reduce S&S violations.

When the District Manager receives a decision from the Administrator to issue a Notice of Pattern of Violations, the District Manager is to send by certified mail, or hand deliver, the Notice of Pattern of Violations to the mine operator. This notice must be posted on the mine bulletin board. A copy of this notice also is to be provided to the representative of miners and the Pattern of Violations coordinator. Following notification to the operator, the District Manager should initiate appropriate inspection activities to ensure that the mine is inspected in its entirety during the following 90-day timeframe.

**104.5 Termination of Notice**

When a Notice of Pattern of Violations is terminated in accordance with 30 CFR 104.5, an authorized representative is to issue a notice of termination to the mine operator and is to provide a copy to the representative of miners and the Pattern of Violations coordinator.

PUBLIC HEARING ON MSHA:  
PROPOSED RULE OF PRACTICE FOR  
PATTERN OF VIOLATIONS

H E A R I N G

held at The Ramada Inn, Pittsburgh, Pennsylvania, on Wednesday, November 1, 1989, beginning at the hour of 9:00 a.m.; before Jenifer Pennline, a Professional Reporter, in and for the said County of Allegheny.

- - - - -

A P P E A R A N C E S

MEMBERS OF THE PANEL:                   Richard Zeutenhorst  
  Ernie Teaster  
  Dave McConnell  
  Dale Cavanaugh

- - - - -

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Professional Reporting Service

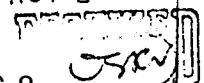
500 Renshaw Building

9th & Liberty

Pittsburgh, Pennsylvania 15222

(412) 765-3133

NOV 2 8 1989



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1                   I N D E X

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3                   Hearing No. 2

4                   OPENING STATEMENT

5                   RICHARD ZEUTENHORST                   3

6                   WITNESSES

7                   JOEL M. McKEAN                   11

8                   LINDA RAISOVICH-PARSONS           26

9                   EUGENE C.JENKINS                   41

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MAXINE JACOBY & ASSOCIATES

1                   P R O C E E D I N G S

2                   MR. ZEUTENHORST: Good morning. I am  
3                   Richard Zeutenhorst, Associate Director of the  
4                   Mine Safety and Health Administration's Office  
5                   of Standards, Regulations, and Variances. I  
6                   will be the moderator of this public hearing on  
7                   MSHA's proposal to establish procedures to  
8                   identify mines with a pattern of violations.

9                   With me on the panel are: Program Analyst  
10                  Ernie Teaster, from MSHA's office of Police  
11                  Planning and Evaluation; Dave McConnell, from  
12                  the Labor Department Solicitor's Office; and  
13                  Dale Cavanaugh, Supervisory Safety and Health  
14                  Standards Coordinator from my staff.

15                  The purpose of this hearing, as stated in  
16                  the notice of hearing, is to receive relevant  
17                  comments and data on MSHA's pattern of  
18                  violations proposed rule which was published in  
19                  May of this year. Most of the major issues  
20                  arising from that proposal were stated in the  
21                  October 19, 1989 Federal Register notice  
22                  announcing this hearing.

23                  This is the first of two public hearings.  
24                  The second hearing will be held on Wednesday,  
25                  November 8, 1989, Denver, Colorado.

1                   These hearings are being held in accordance  
2                   with Section 101 of the 1977 Federal Mine Safety  
3                   and Health Act, and it is the practice of this  
4                   Agency that formal rules of evidence will not  
5                   apply. Today's proceeding will be conducted in  
6                   an informal manner.

7                   Those of you who notified MSHA in advance  
8                   will be able to make your presentations first,  
9                   and upon request will be followed by others who  
10                  wish to have an opportunity to speak.

11                  Anyone who has not previously requested to  
12                  speak should indicate their intention to do so  
13                  by signing the list which has been circulated.

14                  During this proceeding the hearing panel  
15                  will be available to address questions to  
16                  speakers. To insure an accurate record, if you  
17                  do have questions, please come to the podium and  
18                  begin by clearly stating your name and  
19                  organization. In order to clarify certain  
20                  points, the panel may ask questions of the  
21                  speakers.

22                  Time will also be made available, as is the  
23                  usual practice in our Agency's hearings, for  
24                  those wishing to make additional statements.

25                  As the moderator, I may exercise discretion

MAXINE JACOBY & ASSOCIATES

1           to exclude irrelevant or unduly repetitious  
2           material and questions.

3           A verbatim transcript of this hearing is  
4           being taken, and it will be made part of the  
5           rule-making record. The hearing transcripts,  
6           along with all of the comments that MSHA has  
7           received to date on the proposed rule will be  
8           available for review by the public. However, if  
9           you wish a personal copy of the hearing  
10          transcript, you may make your own arrangements  
11          with the court reporter.

12          MSHA will also accept additional written  
13          comments and other appropriate data on the  
14          proposed rule from any interested party,  
15          including those who have not presented oral  
16          statements. These written comments may be  
17          submitted to me during this hearing or sent to  
18          the address listed on the hearing notice. All  
19          written comments and data submitted to MSHA will  
20          be included in the rule-making record. The  
21          record will remain open until December 8, 1989,  
22          to allow for the submission of post-hearing  
23          comments and data.

24          By way of background, this proposal was  
25          developed to implement Section 104(e) of the

1                   1977 Mine Act. This provision addresses mines  
2                   with a pattern of violations which are of a  
3                   nature that could have significantly and  
4                   substantially contributed to the cause of health  
5                   or safety hazards. Section 104(e) requires  
6                   that a notice be issued to a mine operator with  
7                   a mine that has a pattern of significant and  
8                   substantial S&S violations. Once a Section  
9                   104(e) pattern notice is issued, any inspection  
10                  within 90 days which reveals another S&S  
11                  violation results in an order to withdraw all  
12                  persons from the affected area of the mine until  
13                  the violation is abated.

14                  The statute further requires that  
15                  withdrawal orders continue to be issued for  
16                  subsequent S&S violations until an inspection of  
17                  the entire mine reveals no further S&S  
18                  violations.

19                  The 1977 Mine Act does not define "pattern  
20                  of violations," but rather authorizes the  
21                  Secretary to make such rules as necessary to  
22                  establish criteria for determining when a  
23                  pattern exists. Congress provided the Secretary  
24                  broad discretion in determining these criteria.

25                  MSHA first published a proposed rule to

1                   implement the statutory pattern of violations  
2                   provision in 1980. However, this proposal was  
3                   withdrawn in February 1985, in an advance notice  
4                   of proposed rule-making. The 1985 notice was  
5                   intended to address many of the concerns  
6                   expressed about the 1980 proposal, as well as  
7                   take into consideration the Agency's enforcement  
8                   experience under the 1977 Act.

9                   On May 30th of this year, MSHA published  
10                  the proposed rule we are here to discuss.

11                  MSHA believes that two principles are  
12                  central to this rule-making: First, based on  
13                  the legislative history of the 1977 Mine Act, it  
14                  is clear that the pattern provisions are  
15                  directed at only a few mines. This is not a  
16                  rule with pervasive application. The mines  
17                  addressed are those where S&S violations are  
18                  abated when cited but chronically occur without  
19                  the mine operator taking effective preventative  
20                  action.

21                  Congress intended the pattern provision to  
22                  protect miners from such disregard for their  
23                  safety and health. And that is the Agency's  
24                  intent with this rule-making.

25                  Second, the pattern rule must include

1                   procedures for fair and full notice, allowing  
2                   all parties to respond to MSHA's determination  
3                   that a particular mine may have a pattern of  
4                   violations.

5                   Third, to be truly effective, a pattern  
6                   violations rule must have a strong remedial or  
7                   corrective effect. It must get the mine  
8                   operator's attention with the ultimate goal of  
9                   restoring safe and healthful working conditions  
10                  at the mine rather than closing it down.

11                  Because S&S violations form the basis for  
12                  finding a pattern of violations, many commenters  
13                  have repeatedly stated that a more uniform  
14                  application of the criteria for determining what  
15                  violations are S&S is needed in MSHA's  
16                  enforcement activities. These commenters have  
17                  suggested that the criteria for S&S violations  
18                  be defined in the rule as it was by the Federal  
19                  Mine Safety and Health Review Commission in the  
20                  National Gypsum case.

21                  MSHA agrees that the definition of S&S  
22                  violations, which in part form the basis of a  
23                  pattern determination, must be consistent with  
24                  the definition of S&S violations established by  
25                  the Review Commission.

1                   As recently as September 21st of this year,  
2                   MSHA has reaffirmed this position in policy  
3                   program memo for metal, nonmetal, and coal mines.  
4                   That policy letter states in part that: "In  
5                   determining whether a violation could  
6                   'significantly and substantially contribute to  
7                   the cause and effect of a mine safety or health  
8                   hazard,' inspectors must first find that: (1)  
9                   an injury or illness would be reasonably likely  
10                  to occur if the violation were not corrected;  
11                  and (2) if the injury or illness were to occur,  
12                  it would be reasonably serious. Both of these  
13                  findings must be made before a violation can be  
14                  designated as 'significant and substantial.'"

15                  MSHA continues to believe that including a  
16                  definition in this rule of what constitutes an  
17                  S&S violation is neither appropriate nor  
18                  necessary. In accordance with prevailing case  
19                  law, each violation must be independently  
20                  evaluated by the inspector to determine whether  
21                  the circumstances meet the S&S criteria. The  
22                  S&S criteria do involve subjective elements that  
23                  must be resolved by the best judgment of  
24                  inspector. Under any particular circumstances,  
25                  the inspector's judgment, like that of any of

10

1 us, may result in differences of opinion as to  
2 the validity of that judgment. In that respect,  
3 the citations orders leading to a pattern of  
4 violations notice would not differ from those  
5 involved in the Agency's other enforcement  
6 actions. Although MSHA remains committed to  
7 working toward consistent assessment of the  
8 degree of hazard posed by violations, and hence  
9 more consistency among districts, there will  
10 always be some variation from inspector to  
11 inspector. The Agency intends, however, that  
12 such variation will play no significant role in  
13 whether a mine is placed on a pattern of  
14 violations. The key element, rather, must be  
15 whether the mine has a serious safety and health  
16 management problem that is manifested in a  
17 chronic cycle of violations and abatements,  
18 without any effort being made by mine management  
19 to restore the mine to effective, safe and  
20 healthful conditions.

21 We will now begin with those speakers who  
22 have requested to appear today. As previously  
23 stated, if your name does not appear on the  
24 list, you will have an opportunity at the end of  
25 this hearing to make a presentation.

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1                   On behalf of the Pennsylvania Coal  
2                   Association, Joel McKean; on behalf of the  
3                   United Mine Workers of America, Linda  
4                   Raisovich-Parsons; on behalf of the National  
5                   Steel Association, Harry Lane; and on behalf of  
6                   West Virginia Coal Association, Chris Hamilton.

7                   As you begin to speak, please come forward  
8                   and spell your name for the court reporter. If  
9                   you have prepared testimony, I would appreciate  
10                  if you would provide copies to both the reporter  
11                  and the MSHA panel.

12                  We will now have our first witness,  
13                  Joel McKean, from the Pennsylvania Coal  
14                  Association.

15                  MR. McKEAN: I am Joel McKean, President of  
16                  the Pennsylvania Coal Association. We  
17                  appreciate this opportunity to comment on the  
18                  proposed regulations concerning pattern of  
19                  violations under Section 104(e) of the Federal  
20                  Mine Safety and Health Act of 1977.

21                  PCA is a trade association representing 100  
22                  producers of bituminous coal in Western and  
23                  Central Pennsylvania. Members produce coal from  
24                  both underground and surface mines that vary in  
25                  size. All of PCA's members' Pennsylvania mines

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1           are located in MSHA District 2.

2           PCA has previously submitted written  
3           comments to the agency but would like to  
4           supplement them with our testimony here.

5           Our concern is that sufficient procedural  
6           and substantive protections be included in the  
7           proposed regulations so that only the intended  
8           targets of a pattern notice, truly recalcitrant  
9           operators, will be subjected to a pattern notice.  
10          PCA believes that the proposal will not achieve  
11          this.

12          First, the criteria for determining if a  
13          pattern notice is proper are inadequate.

14          Second, the proposal fails to address  
15          fundamental problems in the enforcement of the  
16          Act with respect to violations designated as  
17          "significant and substantial."

18          These regulations are of particular concern  
19          to PCA members because, historically, MSHA  
20          District 2 has the highest rate of significant  
21          and substantial violations in the country.

22          District 2 and the adjacent District had S&S  
23          rates in fiscal year 1988 of 84.2 percent. The  
24          next-closest District was District 9, with a  
25          77.8 percent rate. The average rate for the

1 Districts, other than Districts 2 and 3, was  
2 63.1 percent.

3 In addition, only one other District,  
4 District 4, issued more S&S violations. We also  
5 believe that the S&S rate in District 2 has not  
6 changed to any great extent, although we have  
7 not yet seen the agency figures for the last  
8 fiscal year in this regard.

9 PCA believes that the proposed regulations  
10 will have an unwarranted disparate impact on  
11 operators in District 2, contrary to the purpose  
12 of limiting the application of the pattern of  
13 violations to truly recalcitrant operators. We  
14 do not believe that this high S&S rate in  
15 District 2 indicates a recalcitrant attitude of  
16 the operators in District 2, but rather  
17 indicates a historical pattern of disparate  
18 enforcement.

19 We are also concerned because it appears to  
20 us in the coal industry that the noncoal mines  
21 inspected by MSHA do not receive the same  
22 intensity of enforcement presently that coal  
23 mines do, and thus will be far less likely to be  
24 subject to a pattern notice. Pattern  
25 regulations should be applied fairly to all

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1 segments of the mining industry.

2 We all recognize that the stakes are high  
3 here. The imposition of a pattern of violations  
4 will make it virtually impossible for an  
5 affected mine to continue in operation. Once a  
6 mine receives a pattern notice, termination of  
7 the pattern notice can only occur if the mine  
8 undergoes a complete inspection without  
9 receiving a significant and substantial  
10 violation. As that term has been employed, it  
11 would be a virtual impossibility for an operator  
12 in a mine of any size to achieve a clean  
13 inspection.

14 One need only review a computer printout of  
15 a violation history for any coal mine to  
16 understand the impossibility of achieving a  
17 clean inspection. If an underground coal mine  
18 is on a pattern, it will probably receive  
19 closure orders on a daily basis; no mine can  
20 survive in today's competitive markets at such a  
21 disadvantage.

22 At this point it probably is not  
23 constructive to elaborate upon how the problems  
24 with disparate enforcement and almost universal  
25 use of the S&S designation for all but technical

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1                    violations for coal operators in District 2  
2                    arose. It is more useful to address some  
3                    solutions to these problems so that pattern  
4                    notices achieve their remedial purpose and do  
5                    not result in economic capital punishment for  
6                    operators.

7                    It is critical to recognize that as the  
8                    term "S&S" is currently interpreted and applied,  
9                    the remedial purpose of pattern regulations can  
10                  only be achieved before the imposition of the  
11                  pattern notice. Once it is imposed, there will  
12                  be little realistic opportunity for an operator  
13                  to improve performance sufficiently to escape  
14                  the pattern.

15                  PCA believes that re-examination of certain  
16                  fundamentals of MSHA's enforcement practices as  
17                  they pertain to the definition of S&S is  
18                  essential. For that reason, we think it  
19                  necessary to include in the pattern regulations  
20                  the definition of significant and substantial  
21                  advocated in the comments by the National Coal  
22                  Association, Bituminous Coal Operator's  
23                  Association and American Mining Congress.

24                  We recognize that the Agency attempted to  
25                  do just that by issuing Program Policy Letter

1 P89-I-3, which defined as S&S. That letter,  
2 however, seems to have been defensive in nature  
3 and left open the question of what is meant by  
4 the terms "reasonable likelihood," as it  
5 pertains to the occurrence of an injury and  
6 reasonably serious injury or illness.

7 Inspectors often consider reasonable  
8 likelihood as one which is merely possible.  
9 This is not consistent with commonly understood  
10 or dictionary definitions of these words which  
11 indicate that they suggest probability, as  
12 opposed to mere possibility. A definition that  
13 indicates that the occurrence of an injury must  
14 be probable would provide inspectors with some  
15 realistic guidance as to the meaning of a term  
16 that is crucial to the determination of whether  
17 a violation is significant and substantial.

18 My lawyers advise me that this sort of  
19 definition of "likely" and "likelihood" is  
20 consistent with how courts have defined these  
21 terms.

22 PCA has suggested that "reasonable  
23 likelihood" be defined in the proposed  
24 regulations as: "that it is more probable than  
25 not that continuation of normal mining

1           operations would, within the reasonably  
2           foreseeable future, result in an injury or  
3           illness." This definition would assist an  
4           inspector in evaluating what is meant by this  
5           term. Often, inspectors rely on an improbable  
6           claim of potential occurrences to support an S&S  
7           finding.

8           We also suggest that a reasonably serious  
9           injury or illness be defined to give an  
10          inspector some specific guidance. The Review  
11          Commission has not defined this term, but it is  
12          necessary for the agency to seek to fill this  
13          void.

14          We recognize, however, that it is not  
15          possible to achieve complete uniformity of  
16          application of any definition, given the wide  
17          disparity in enforcement practices in the  
18          various Districts. Moreover, we do not believe  
19          that defining or redefining these terms will  
20          completely remedy the inconsistency and  
21          disparity in enforcement practices.

22          For this reason, we believe an effort must  
23          be made to take into account the disparity in  
24          S&S rates in the various districts and between  
25          coal and metal/non-metal operators. One method

1           of doing this would be to compare similar mines  
2           in the same district or subdistrict since the  
3           disparities in enforcement would not be as  
4           great.

5           Such comparison should be to mines of  
6           similar size and type, since older or larger  
7           mines are not necessarily comparable in  
8           violation rates to newer or smaller mines. We  
9           suggested in our written comments examples of  
10          the types of provisions that should be  
11          considered for inclusion in proposed Section  
12          104.3, outlining the pattern criteria. This  
13          approach would tend to avoid the situation where  
14          an operator with an artificially high rate of  
15          S&S violations, resulting from being in a  
16          disparately high S&S rate District, but who is a  
17          better operator than an operator in a low S&S  
18          rate District, might be subject to a pattern  
19          notice merely because his mine is in a high S&S  
20          District.

21          If changes are not made in the proposal, we  
22          believe that the pattern notice will be imposed  
23          unfairly. Every effort to prevent unfairness  
24          must be made at this juncture, because once the  
25          regulations are adopted and implemented, it will

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1       be too late for the operator unfairly singled  
2       out to remedy the situation.

3           For this reason, PCA believes that it is of  
4       utmost importance that the operators be given as  
5       much opportunity as possible for notice of a  
6       pattern and submission of mitigating  
7       information.

8           To this end, we have suggested in our  
9       written comments to eliminate unduly restrictive  
10      time frames. Along with industry, we suggest  
11      that the time frames be expanded. The proposal  
12      states that these time frames were short because  
13      of the presence of a serious safety hazard.

14           Even recognizing that, they should not be so  
15      short as to deprive the operator of due process.  
16           The determination that a pattern exists is  
17      probably an irreversible and unappealable  
18      decision. It should not be driven by  
19      unreasonable time frames.

20           Finally, we are concerned with the  
21      generality of criteria of the initial screening  
22      and issuance of a notice in proposed Sections  
23      104.2 and 104.3. Those provisions simply list  
24      the factors that will be considered without  
25      indicating how they will be weighed. While we

1           recognize that the identification of  
2           recalcitrant operators requires evaluation of  
3           subjective and objective factors, we are  
4           extremely concerned about the lack of  
5           substantive criteria.

6           Given the history of disparate enforcement  
7           of the Act, as shown by the S&S rates, we are  
8           concerned with the disparate application of  
9           these very vague criteria. We recognize that  
10          the 1980 advance notice of proposed rule-making  
11          drew criticism as being too mathematical.

12          However, PCA believes that the proposed rules go  
13          too far in the opposite direction. The  
14          establishment of thresholds of S&S ratios and  
15          other modifications suggested in our written  
16          comments will help to avoid the uncertainty and  
17          potential for abuse that the existing proposal  
18          will create.

19          We also strongly urge that no consideration  
20          be given to the violations that existed prior to  
21          the effective date of the regulations. In its  
22          discussion, MSHA indicated it would consider  
23          prior violations. We believe this is  
24          inappropriate, particularly in light of what we  
25          consider as a necessary adjustment in

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1 enforcement policies.

2 Thank you for your careful consideration of  
3 these comments. PCA respectfully urges that the  
4 proposal be modified in accordance with our  
5 suggestions and those of the mining industry  
6 generally. The Agency has a most difficult task  
7 confronting it. We would hope that in  
8 addressing these issues that Agency move to  
9 insure that the purpose of the Act be fulfilled.  
10 Thank you very much.

11 MR. ZEUTENHORST: Thank you very much,  
12 Mr. McKean.

13 The part of your testimony where you talked  
14 about inspectors needing more guidance on more  
15 reasonable and more serious materials, you  
16 probably know on the Police Letter that you  
17 referred to in your testimony, it does give some  
18 guidance. All of these terms that are in our  
19 policy all come down in the final analysis to  
20 the judgment of the inspector, and the Agency is  
21 making all the effort that we can to make sure  
22 that judgment can be consistent, will be  
23 consistent. But I think we all have to  
24 recognize that there is a judgment call to make,  
25 and that is going to rest in your hands.

1                   MR. McKEAN: I think your introductory  
2 comments were aimed at that, focused on that as  
3 well. And, certainly, we would agree that there  
4 is some point that is a judgment call; there  
5 have to be some subjective as well as objective  
6 criteria. We would just like that to go as far  
7 as we can to give guidance to the inspector, so  
8 that we can be as consistent as possible in  
9 application.

10                  MR. ZEUTENHORST: I would like to clarify,  
11 too, although the Agency fully recognizes,  
12 because of statutory provisions, the pattern of  
13 violation does not need -- our position has  
14 been that this particular ruling is not the  
15 appropriate point to define S&S violation,  
16 because they occurred in many types of  
17 situations.

18                  A pattern of violation is going to  
19 ultimately affect a few mines. Defining a  
20 pattern of violation as a rule that will affect  
21 a few mines would have other ramifications  
22 beyond the pattern provision. That is what I am  
23 trying to define as S&S in this particular rule.  
24 S&S should be consistently applied. But, we  
25 would prefer the Agency to handle this

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23

1 consistency.

2 MR. McKEAN: I think in the notice schedule  
3 that summarizes our concerns. And that is that,  
4 in fact, it is a few mines; it is, in fact,  
5 those that are recalcitrant and not a large  
6 number, because of the application of S&S  
7 violation. In other words, if you have --  
8 depending on how you issue the S&S violation,  
9 you could move from that into a situation where  
10 you had many more than you ever expected to be  
11 classified as recalcitrant operators.

12 MR. ZEUTENHORST: You are also familiar  
13 with, obviously, the 1988 proposal, and you  
14 probably looked at it to prepare for your  
15 testimony. You mentioned some problems with  
16 disparity and whatnot of the 1980 proposal, that  
17 attempted to at least accommodate different mine  
18 sizes and whatnot.

19 Are you proposing we go back to some of  
20 that -- the 1980 statistics --

21 MR. McKEAN: I would like some of my  
22 experts to add, but I would say that what we are  
23 advocating is possibly something in between,  
24 recognizing we try to go too far. We want to  
25 include the problem of going too far to the

24

1           other extreme. I think it is somewhere in the  
2           middle.

3           Mr. Ed Onuscheck, now retired, classifies  
4           himself as a golfer and a fisherman. He is here  
5           if you would like to add to that?

6           MR. ONUSCHECK: I concur with the situation  
7           that Joel is referring to. The 1980 proposal  
8           was too far out mathematically, and I think it  
9           would have been a mathematical nightmare.

10          But, with the situation that we are dealing  
11         with now, we are dealing with, primarily, the  
12         S&S situation, and until we feel we have equity  
13         in the enforcement arm of MSHA, it will be most  
14         difficult to come out with the uniform policy in  
15         order to determine who is to be put on a pattern.  
16         That is a problem that I think faces MSHA right  
17         now, with respect to how the pattern regulation  
18         is going to be effected. And, again, the  
19         recalcitrant operator is the one that the Act  
20         singled out for the pattern regulation.

21          MR. TAYLOR: Hank Taylor from National  
22         Institute for Occupational Safety and Health.

23          I would like to clarify on, I guess, two  
24         things.

25          First, I understood you to say -- I want

25

1           to know if this is correct. I felt there should  
2           be an immediate step continued to exist where a  
3           mine operator is notified that his behavior is  
4           about to fall into a pattern of practice  
5           violation, rather than having someone show up  
6           and say you're a pattern of practice violation.  
7           Is that correct?

8           MR. McKEAN: That the operator at least be  
9           given an opportunity to either explain  
10          mitigating circumstances, to talk about it, yes,  
11          I think you have put it in the right terms.

12          MR. TAYLOR: You also included in there  
13          some time to correct the situation before the  
14          actual --

15          MR. McKEAN: Yes.

16          MR. TAYLOR: I would like a clarification.  
17          The numbers that you stated on presentation of  
18          S&S violation --

19          MR. McKEAN: That is right.

20          MR. TAYLOR: The 89 percent indicated that  
21          on 89 percent of the inspection, there is at  
22          least one S&S violation, or does it indicate  
23          that 89 percent of the violation --

24          MR. ONUSCHECK: 89 percent of all the  
25          violations issued. It is a percentage.

1                   MR. TAYLOR: That doesn't indicate that  
2                   there are any times that somebody is going  
3                   through an inspection without a violation?

4                   MR. ZEUTENHORST: 89 percent of all the  
5                   things written by the inspector being 11 percent  
6                   non S&S.

7                   MR. McKEAN: Right.

8                   MR. TAYLOR: Thank you.

9                   MR. ZEUTENHORST: Our next speaker, from  
10                  United Mine Workers of America, is Linda  
11                  Raisovich-Parsons.

12                  MS. RAISOVICH-PARSONS: My name is Linda  
13                  Raisovich-Parsons, and I am here today on behalf  
14                  of the United Mine Workers of America.

15                  Let me begin by stating that the UMWA is  
16                  wholeheartedly in support of MSHA's long overdue  
17                  decision to develop regulations for implementing  
18                  Section 104(e) of the Federal Mine Safety and  
19                  Health Act of 1977. Congress clearly recognized  
20                  the need to protect miners when recalcitrant  
21                  operators demonstrate total disregard for their  
22                  health and safety.

23                  As a means to address this, Congress  
24                  authorized MSHA to impose stringent sanctions on  
25                  mines which exhibit a chronic history of

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1 persistent dangerous violations. Section 104(e)  
2 was intended as a tool to protect miners from  
3 such neglect of mine health and safety. The  
4 UMWA will be happy to see this long evaded  
5 enforcement tool finally put into effect.

6 An overview of the proposed rule reveals  
7 that MSHA has narrowly limited the situations  
8 that would trigger issuance of a pattern of  
9 violations notice. The procedures employed by  
10 MSHA to identify potential violators are  
11 critical to the effective enforcement of Section  
12 104(e). Therefore, the procedure set forth by  
13 these regulations is of utmost concern to the  
14 UMWA. A summary of our concerns with each  
15 section of the proposed rules are as follows:

16 Section 104.2, Initial Screening: The  
17 proposed rule requires that the compliance  
18 record of mines be reviewed once each year for  
19 indications of a pattern of violations.

20 We do not feel that an annual review is  
21 frequent enough. Under an annual review, a mine  
22 could immediately after the review begin to  
23 establish a pattern of violations, which would  
24 remain undetected for nearly a year. In this  
25 situation, a mine could continue to operate with

1           a pattern of dangerous health and safety  
2           conditions for close to a year before any action  
3           would be taken to restore the mine to a safe  
4           condition. This is far too long to permit a  
5           potentially disastrous operation to continue  
6           unchecked. We recommend at least a bi-annual  
7           review.

8           Paragraph (b)(2) of this section calls for  
9           consideration of whether there is evidence of  
10          the mine operator's lack of good faith in  
11          correcting the problem that results in repeated  
12          S&S violations.

13          Further, (b)(4) provides for consideration  
14          of whether mitigation circumstances exist. The  
15          UMWA urges the Secretary not to make an  
16          operator's state of mind or intent a factor to  
17          be considered prior to the issuance of a Section  
18          104(e) notice.

19          The Senate Committee report clearly states  
20          Congress's wish that intent or state of mind of  
21          the mine operator not be criteria for  
22          determining when a pattern of violations exists.  
23          Accordingly, the operator's good faith, absence  
24          of negligence, knowledge and any extenuating  
25          circumstances should not be factored into the

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1 Agency's review. If a review of the citation  
2 history indicates a pattern of S&S violations, a  
3 notice should be issued, regardless of  
4 mitigating factors. Certainly the issuance of a  
5 single S&S citation, not to mention a string of  
6 them, should be enough to alert an operator  
7 about a health and safety problem at his mine  
8 and present him with the need to take corrective  
9 action.

10                   Section 104.3, Pattern Criteria: Once a  
11 mine is identified through the initial  
12 screening, the provisions of this section would  
13 be used to identify those with a potential  
14 pattern of violations. Contrary to the  
15 expressed intention of Congress, MSHA has  
16 restricted the situations that would trigger a  
17 pattern notice.

18                   The Senate Committee report clearly  
19 indicated that this enforcement mechanism was  
20 not to be limited only to violations of the same  
21 standard, nor to violations which are the result  
22 of an operator's unwarranted failure to comply.  
23 Aside from this, MSHA has incorporated these two  
24 limitations into the criteria used to identify a  
25 pattern of violations.

30

The third criteria is limited to a history of repeated S&S violations of standards related to the same hazard. Nowhere in the proposal is there a mechanism for triggering a pattern notice at a mine that has simply had a history of S&S violations.

Of course, MSHA should have the ability to issue a pattern notice where the criteria in the proposed rule apply. However, they should not be restricted to those situations alone. We recommend that this section include a criteria that would simply identify mines with a history of S&S violations.

Congress clearly expected MSHA to have the ability to issue a pattern notice where there is a history of S&S violations, even if the violations are related to different standards or different hazards.

The regulations should further clarify the fact that it is not necessary to meet all of these criteria. A mine meeting any one of the criteria would be subject to a pattern notice.

In addition to the criteria in Paragraph (a), MSHA should also give consideration as to whether the mine under review has been placed on

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1 a pattern in the past. If a mine has been on a  
2 pattern before, MSHA should closely monitor  
3 these mines to examine whether they have a  
4 tendency to become repeat offenders. If any  
5 such mine falls into a gray area as to whether a  
6 pattern exists, MSHA must give due consideration  
7 to the fact that the mine has had a pattern of  
8 violations in the past. This should  
9 substantiate that the mine has serious health  
10 and safety problems.

Paragraph (b) of this section provides that  
only final citations and orders will be  
considered when identifying mines with a  
potential pattern of violations. The UMWA  
strongly opposes this proposal.

If MSHA restricts itself to final citations and orders when identifying mines with a potential pattern, operators will be strongly motivated to challenge every S&S citation they are issued, regardless of the merits of their position. If MSHA waits until the legal challenges are exhausted, then they will be trying to determine whether a pattern exists on the basis of conditions that were cited several years previously.

1                   Moreover, by filing legal challenges,  
2                   operators will be able to escape any liability  
3                   under Section 104(e), even though the citations  
4                   and orders are ultimately upheld. This is  
5                   because MSHA, in considering the mine's history,  
6                   will probably wind up limiting itself to a  
7                   certain time frame, such as one or two years.

8                   It would certainly be easy enough for an  
9                   operator to challenge S&S citations, and keep  
10                  their validity in limbo for that period of time.

11                  Once the time period that MSHA used had  
12                  passed, the operator could safely drop its  
13                  challenge. The operator would know that even  
14                  though the citation was not final, it would be  
15                  too old to be included in an assessment for a  
16                  pattern notice.

17                  Requiring a Section 104(e) order to be  
18                  based only on final citations and orders is  
19                  completely contrary to the rest of the Act's  
20                  enforcement scheme. A failure to abate an order  
21                  under Section 104(b), or an unwarrantable  
22                  failure order under Section 104(d) are each  
23                  issued on the basis of previous citations,  
24                  whether or not those citations have been  
25                  challenged. Likewise, an operator who disputes

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an inspector's determination as to whether an imminent danger exists must comply with the Section 107 order, while he challenges its issuance.

5 There is absolutely nothing in the  
6 legislative history which supports such a  
7 different and restrictive approach to the  
8 application of Section 104(e).

Indeed, the legislative history requires the opposite conclusion. In discussing the sequence for issuing a Section 104(e) order, the Senate Committee noted that the pattern order sequence parallels the current unwarrantable failure sequence of the Coal Act and the unwarranted failure sequence of Section 105(c) of the bill. If pattern orders can be based only on final citations, its enforcement cannot be said to parallel that of Section 104(d), as Congress intended.

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1 orders issued to an operator for repeated S&S  
 2 violations of standards provide the operator  
 3 with ample warning of a potential pattern notice.  
 4 This should signal that serious health and  
 5 safety problems exist, and that a course of  
 6 action is needed to improve the mine's violation  
 7 record.

8 If a procedure is established to provide  
 9 additional input regarding the information upon  
 10 which the pattern notice is based, it should be  
 11 done through written comments, with copies  
 12 provided to all parties. An opportunity for a  
 13 conference as proposed, discriminates against  
 14 the miners' representatives, unless such  
 15 representative is protected against pay loss.

16 Such a conference is currently provided by  
 17 30 CFR Section 100.6 for review of citations and  
 18 orders. Although miners' representatives are  
 19 afforded an opportunity to participate, they are  
 20 usually unable to do so. This is because pay is  
 21 generally not provided to miners' reps for  
 22 attending these conferences.

23 The conferences requested by mine operators  
 24 are very frequent and many local unions are not  
 25 financially able to pay lost wages for

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1 representatives to attend these events so often.

2 This normally leaves the conferences open to the  
3 operators' attempts to influence and pressure  
4 MSHA to vacate citations and orders. To provide  
5 another conference procedure for review of a  
6 pattern of violations notice would more than  
7 likely result in the same situation.

8 The UMWA, therefore, recommends that any  
9 input be reduced to writing to provide a fair  
10 balance to the procedure unless, as a  
11 precondition to requesting a conference, the  
12 operator agrees to reimburse the miners'  
13 representative for any lost wages.

14 The Union further recommends that any mine  
15 identified as having been subject to a pattern  
16 notice in the past should not be afforded the  
17 opportunity for further input regarding the  
18 information on which a pattern notice is based.  
19 These mines should be subject to an automatic  
20 pattern of violations notice if the criteria is  
21 met because these operators have already  
22 exhibited a disregard for health and safety in  
23 the past. This should be sufficient grounds to  
24 implement Section 104(e), without further  
25 review.

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1 During the time permitted for response to  
2 notification of potential pattern of violations,  
3 the proposed rule provides the operator an  
4 opportunity to institute a program to avoid  
5 repeated S&S violations. The District Manager  
6 is then given the flexibility to determine  
7 whether this last-ditch effort to avoid 104(e)  
8 enforcement is effective and whether he is going  
9 to recommend the mine be placed on a pattern  
10 notice.

11 The rules do not provide any indication of  
12 how these programs will be determined to have  
13 effectively reduced the occurrence of S&S  
14 violations at a mine. There is a tremendous  
15 potential for abuse by operators and District  
16 Managers under this provision.

17 A mine which has been identified as having  
18 serious problems could never come under the  
19 enforcement mechanism set out in Section 104(e),  
20 simply on the basis of the District Manager  
21 determining that a program has effectively  
22 reduced the occurrence of S&S violations. The  
23 proposed regulations require the District  
24 Manager to submit a report if he continues to  
25 believe that a potential pattern of violations

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1 exists at the mine. The proposed regulations  
2 require no report, however, if the District  
3 Manager determines that the program has  
4 effectively reduced the occurrence of S&S  
5 violations at the mine.

6 It is more important to require a report in  
7 the second situation since the regulations are  
8 so general, and do not specify what an effective  
9 reduction is. MSHA must require reports when  
10 District Managers determine that a potential  
11 pattern no longer exists, if there is to be  
12 uniformity in enforcement practices.

13 This proposed procedure leaves a number of  
14 unanswered questions as to how it will be  
15 enforced. What happens if, during the 90-day  
16 trial period, an operator continues to receive  
17 S&S citations but decides to challenge virtually  
18 all of them? Will an MSHA District Manager not  
19 count them because they are not final and  
20 declare there has been an effective reduction in  
21 citations?

22 What about the pressure that may be put on  
23 MSHA inspectors, especially during the 90-day  
24 trial period, to cite violations as non S&S?  
25 What happens if an operator improves for the

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1                   90-day trial period and then slacks off? Will  
 2                   MSHA start all over again, notifying the  
 3                   operator that there is a potential pattern and  
 4                   allowing another 90 days for fine tuning the  
 5                   program? Such a cycle could go on indefinitely  
 6                   and allow operators with a pattern of violations  
 7                   to escape enforcement under 104(e).

8                   Section 104.5, Termination of Notice: This  
 9                   section reflects the Act's requirement that once  
 10                  a pattern of violations notice is issued, the  
 11                  notice can only be terminated after an MSHA  
 12                  inspection of the entire mine finds no S&S  
 13                  violations of a mandatory safety or health  
 14                  standard.

15                  Paragraph (b) recognizes partial  
 16                  inspections covering the entire mine over a  
 17                  90-day period. The 90-day inspection is much  
 18                  too lengthy. Conditions in an underground mine  
 19                  change rapidly and variedly. Consequently, a  
 20                  part of the mine that was inspected and declared  
 21                  "clean" on day one of the inspection may be  
 22                  hazardous by day 90.

23                  A complete inspection of a mine should not  
 24                  take more than 30 days. Therefore, the UMWA  
 25                  recommends that the length of time for a series

1 of partial inspections be limited to 30 days.<sup>39</sup>

2 I appreciate the opportunity to testify  
3 today, and if you have any questions, I will be  
4 glad to answer them.

5 MR. ZEUTENHORST: First of all, I want to  
6 clarify a point.

7 You were concerned under Section 104.3,  
8 Pattern Criteria. You recommended that just one  
9 of those had to be met. You did not have to  
10 have the history of the repeated S&S on one  
11 standard. Any one of those would be sufficient  
12 under this proposal to put them on.

13 Further, just a bit of background why we  
14 chose, as an agency, to use as the element that  
15 linked together violations throughout the mine  
16 instead of just going through the history S&S  
17 violations.

18 As you know, most large mines would have a  
19 history of S&S violations. What that history  
20 would be is if you are talking numbers, then you  
21 would have to come up with some sort of  
22 qualification of how you would characterize that  
23 history to be a pattern.

24 We looked at the unwarrantable as something  
25 that would link together unrelated situations

1    40  
2     throughout the mine, that would give some  
3     indication that there is a serious health and  
4     safety management problem in the mine. That is  
5     why we chose to specify something more specific,  
6     rather than just a general history of S&S.

7      
8     I have a question for you on -- under the  
9     provisions, we have to allow a District Manager  
10    to advise a mine that they are developing a  
11    pattern, and they should come up with a program  
12    to correct that situation. Is it your situation  
13    that we should not have that program at all, or  
14    rather that the program, as specified in the  
15    proposal, is not specific enough?

16      
17    MS. RAISOVICH-PARSONS: I think, generally,  
18    it is not specific enough; it does not specify  
19    that, one, that 90-day program has been  
20    completed. What happens then? Does the  
21    District Manager make the determination whether  
22    or not the program is approved within the  
23    company at the mine, or can he implement another  
24    program? It is just not clear enough.

25      
26    MR. ZEUTENHORST: Again, the reason we had  
27    that is the intent that a pattern has a very  
28    strong corrective action. Once you do get into  
29    a pattern notice, then you are, basically, in

1                   our minds, failing to really correct that mine.<sup>41</sup>

2                   We are trying to emphasize --

3                   MS. RAISOVICH-PARSONS: Our position is  
4                   that that cycle could go on indefinitely. There  
5                   will be another 90-day program, and another one.  
6                   There has to be some limit.

7                   MR. ZEUTENHORST: Okay. Thank you.

8                   Our next speaker is from United Mine  
9                   Workers of America, Mr. Eugene Jenkins.

10                  MR. JENKINS: My name is Eugene C. Jenkins.  
11                  I am a member of the United Mine Workers of  
12                  America, Local 1368.

13                  I would like to comment on the patterns of  
14                  violation. Also, we feel that that need for a  
15                  pattern violation is evident by the tragedy of  
16                  the loss of lives at Scotia Mine, occurring in  
17                  March of 1976. This mine had a chronic history  
18                  of persistent damage violations cited by MSHA,  
19                  and abated the operator; but the operator would  
20                  still permit the mine to lapse back into  
21                  violation, exposing the miners to the same risks  
22                  all over again.

23                  We don't feel exposing the miners to the  
24                  same risk over again -- we don't feel that  
25                  Section 104(e) of the '77 Act was intended as an

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1 effective tool to protect miners when the 42  
2 operator continues to violate health and safety  
3 of mines through continued patterns of  
4 violation.

5 The lawmakers who enacted the statute make  
6 it clear that a pattern of violation by our  
7 operators who have a history of repeated S&S  
8 violations, and debating -- but then continued  
9 to let recur without effective preventative  
10 measures being taken is wrong, and something  
11 needs to come to be done to correct this  
12 neglect.

13 We further feel that Section 104.2, on  
14 initial screening on MSHA's proposal on the rule  
15 of reviewing compiled records of mines, at least  
16 annually is sufficient enough. We don't believe  
17 our miners should have to wait and work under  
18 conditions let go this long before something is  
19 done. Each miner is entitled to health and  
20 safety standards which guarantee a safe working  
21 place.

22 We feel at least twice a year, or even  
23 quarterly, should be used on screening for  
24 pattern violations. Repeated S&S violations of  
25 the same standard or hazard are probably a

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result of the chronic conditions of the mines in  
which violations are abated when cited without  
correction of the underlying cause of such  
violation.

This suggests that there exists a serious  
health and safety problem at these mines, and  
need to be corrected before we have another  
Scotia.

We further feel by a pattern of violation,  
if issued, the representative, miners, and the  
mine operators should have input before a  
pattern of violation notice would be issued.  
  
Once a pattern is established, and the miner  
operator requests a conference with the District  
Manager, the miners' representative also is  
given the opportunity to participate. We feel  
that miners' representative should be paid by  
the company for time spent at these conferences.  
  
Conferences requested by the operator are very  
frequent, and many locals cannot pay lost wages  
to the representatives. This could result in  
operators and MSHA conferences, per se, without  
the miners' representative's input, and the  
possibility of operators' influence in  
pressuring MSHA to vacate citations and orders.

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1           We recommend that any input be reduced to  
2 writing, to provide a fair balance of procedure  
3 of the pre-conditioning continuance. The  
4 operator agreed to reimburse the miners'  
5 representatives for lost wages for attendance at  
6 these conferences.

We also further feel that any mines  
identified as having a pattern notice in the  
past should not be afforded the opportunity for  
further input and continued long periods of time  
exposing our miners to conditions which are  
unsafe or hazardous to their health or  
well-being. These mines should be brought  
subject for automatic pattern of violation.

I know from my experience in the mines,  
15  
inspection after inspection, quarterly  
16  
inspection, we have close-outs, and the same  
17  
types of violations occur, time and time and  
18  
time again. I think it's time that something is  
19  
done, and those violations do cease before we do  
20  
have another Scotia or unfortunate incident in  
21  
the mining industry.  
22

23                   It is time that something should be done,  
24                   because I heard one gentleman comment about  
25                   S&S-type citations. Sure, in District 2, all

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1 are S&S, or the majority of them are S&S, and I  
2 feel proud that has happened, because I think in  
3 the other Districts the inspectors aren't doing  
4 their job.

If I was a coal operator and got a non-S&S violation, and only had to pay a \$20 fine, I wouldn't care if I got a violation or not. That is the reason why the Union push for S&S-type citations. We are not after the company to break them for anything else, because we all live there and make a decent wage and earnings, and support our families, but it is time that something is done to prevent these tragedies that are happening to coal miners, which influence their families and everything else.

16 | Thank you.

22                   MR. JENKINS: There are a lot of them that  
23                   are the same, quarter after quarter after  
24                   quarter. They don't really do anything about  
25                   them, per se. Maybe they do. If there is a

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1 violation that is electrical or something, maybe  
2 they will call the mechanics in who are supposed  
3 to sign the books and check these conditions.  
4 They will talk to them; then nothing is done.  
5 The next month the same citations reoccur. It  
6 is just a continuous snowball effect.

7 MR. ZEUTENHORST: Thank you, sir.

8 Our next speaker is Vic McNevlin.

9 MR. MCNEVLIN: My name is Vic McNevlin,  
10 Chairman of Safety, Local 2221 Mine.

11 Gene pretty well shot down my notes. I am  
12 going to try to fill in as best I can.

13 On Part 104, under Section 104.2, the  
14 initial screening under a compliance record,  
15 they were stated about reviewing once a year. I  
16 would like to see that, like Linda said earlier,  
17 bi-annually. I would even want to see it  
18 quarterly.

19 Number two, say, if you have 80 S&S  
20 violations and only two non-S&S, say in four  
21 months' time, I believe the operator should be  
22 alerted at that mine about health and safety. I  
23 do not think they need any more time as far as  
24 correcting it. Using those 80 S&S, say 40 of  
25 those were rock dust and spillage, I think they

1                   ought to know they have a problem there. 47

I'm not saying they don't, but as far as  
UMW stands, I am willing to sit down with them  
to see what we can do to correct these  
violations.

6 Number three, 104.3, pattern criteria --  
7 you commented on this before -- any S&S  
8 violation should come into play here. Maybe you  
9 can fill me in on that after I am done here.

I believe if it is a ventilation or rock  
dust, or whatever, I believe one is as serious  
as the other; and I am sure you do, too. But,  
somehow I missed part of that layout before.

I am not going to go over "4." Number 5,  
104.5, termination of notice, as far as the 90  
days on the inspection, I feel that is much too  
long. I think we have enough people,  
inspectors, that a complete inspection could be  
done in 30 days. It seems to me -- I could be  
wrong about this -- but in my notes, some mine  
industries or companies in Keystone Mining are  
asking for conferences on violations recently.  
I don't know what it is. I am not going to  
comment any further on it. Maybe you could  
answer that for me, too, as far as: Are more

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1 conferences being requested within reasonable  
2 quarters? 48

3 That is all I have.

4 MR. ZEUTENHORST: I do not know of that  
5 information. Let me try and explain what I was  
6 mentioning before.

7 It is MSHA's position at the Legislative  
8 District, which is not on the Act, but which is  
9 the record of what Congress' deliberations on  
10 creating are very clear that the pattern  
11 violations are to apply to a few operators,  
12 Scotia type, as being very correct in saying the  
13 beginning of the pattern provision.

14 Just to say that a history of S&S  
15 violations should make a mine be put on a place  
16 of pattern of violation is sufficient. You have  
17 to define what that history would be, because  
18 every mine, a good-size mine, would have a good-  
19 size S&S violation.

20 We need to try as an Agency to go beyond  
21 that and figure out what is going to distinguish  
22 the pattern violator's history of S&S violations  
23 from industry. Is that helpful?

24 MR. McNEVLIN: Yes.

25 MR. ZEUTENHORST: Okay. Thank you.

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1 Our next speaker is Harry Lane.

2 MR. LANE: Mr. Chairman and members of the  
3 Mine Safety and Health Administration panel, I  
4 am Harry C. Lane, President of the John S. Lane  
5 & Son, Inc. of Westfield, Massachusetts. I am  
6 here today as Chairman of the National Stone  
7 Association, a Washington, DC-based trade  
8 association that represents producers of crushed  
9 stone and other aggregates.

10 There are currently 3,473 active crushed  
11 stone quarries in operation in the United  
12 States, representing 1,759 companies. In 1988,  
13 the value of crushed stone sold or used in this  
14 country totaled \$5.6 billion. Crushed stone is  
15 quarried or mined in 49 of the 50 states, and is  
16 an essential part of our nation's  
17 infrastructure, as well as being vital to the  
18 construction of housing, business, and  
19 industrial facilities.

20                   NSA is pleased that MSHA has decided to  
21                   hold this public hearing on its proposed  
22                   regulation for pattern of violations. When the  
23                   proposed rule was issued on May 30, 1989,  
24                   Federal Register, 23156, NSA reviewed it and  
25                   found a number of provisions that are of great

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1 concern to our industry.

2 On August 22, 1989, NSA provided written  
3 comments on the proposed rule, explaining in  
4 detail our position on this regulation. A copy  
5 of these comments is included with this  
6 statement, known as Attachment A. I would now  
7 like to briefly summarize the earlier comments  
8 and make some additional observations.

9 NSA shares the concerns of Congress and  
10 MSHA about worksite safety, and strongly  
11 encourages its members to comply fully with the  
12 established mandatory safety and health  
13 standards. To assist our members in complying  
14 with these measures, and to keep them up to date  
15 on significant regulatory and legislative  
16 requirements, NSA has active Health and Safety  
17 and Environmental Committees that serve as  
18 resource groups and work to stimulate interest  
19 in effective occupational health and safety  
20 programs.

21 Kenneth Klinger, Director of Safety for the  
22 W.W. Boxley Co., Roanoke, Virginia, is Chairman  
23 of NSA's Health and Safety Committee. He is  
24 here with me today and will be happy to answer  
25 any questions you might have about NSA's

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1                   activities in this area.

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2                   The proposed rule establishes criteria and  
 3                   procedures for identifying mines with a pattern  
 4                   of violations of mandatory standards that  
 5                   significantly and substantially contribute to  
 6                   safety and health hazards. The proposed rule  
 7                   would implement Section 104(e) of the Federal  
 8                   Mine Safety and Health Act of 1977.

9                   The intent of Congress in enacting the Mine  
 10                  Act was to target those mine operations that  
 11                  have serious and repeated safety and health  
 12                  management problems. The Mine Act authorized  
 13                  MSHA to impose stringent sanctions on mines that  
 14                  develop a pattern of violations.

15                  Section 104(e) of the Mine Act requires  
 16                  that a notice be issued to a mine operator if  
 17                  the mine has a pattern of S&S violations. After  
 18                  such notice is issued, any inspection within 90  
 19                  days which reveals another S&S violation results  
 20                  in an order to withdraw all persons from the  
 21                  affected area of the mine until the violation is  
 22                  abated. Withdrawal orders continue to be issued  
 23                  for subsequent S&S violations until an  
 24                  inspection of the entire mine reveals no S&S  
 25                  violations. A withdrawal order requires all

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miners to be removed from the affected area and prohibits entry, with the exception of personnel assigned to eliminate the violation.

Under current law, the Mine Act does not define pattern of violations, but authorizes a rule-making process to establish such criteria.

In 1981, MSHA adopted a definition of S&S violations as those that have a reasonable likelihood of resulting in a reasonably serious injury or illness.

In a 1985 Notice of Proposed Rulemaking, MSHA stated its intent to develop a regulation that would focus on the safety and health record of each mine, rather than on strictly quantitative comparisons of mines to industry-wide norms. The result of this Notice of Proposed Rulemaking is the proposed rule now being examined.

The primary concern of NSA regarding this proposed rule centers on Section 104.3, Pattern Criteria. As written, the proposed rule seeks to identify potential patterns of violations. NSA believes the word "potential" should be deleted wherever it appears in the rule.

The intent of Congress was to target only

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those operators who demonstrate disregard for  
the health and safety of miners through an  
established pattern of violations (legislative  
history of the Federal Mine Safety and Health  
Act of 1977, page 620). NSA believes the  
proposed rule is overly broad and will affect  
many mining operations that do not fit the true  
intent of Congress.

We feel that the definition of significant  
and substantial should be more clearly stated in  
this rule. NSA advocates including in this rule  
the definition of S&S provided by the Federal  
Mine Safety and Health Review Commission in  
Secretary of Labor, MSHA v. Cement Division,  
National Gypsum Co., that definition being  
having a reasonable likelihood of resulting in a  
reasonably serious injury or illness.

18                   NSA also believes that the term  
19                   "unwarrantable failure," as used in Section  
20                   104.3(a)(3), should be defined as established by  
21                   law in Emery Mining Corporation v. Secretary of  
22                   Labor, MSHA.

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1 comments. The extreme sanctions of the pattern  
2 of violations proposed standard beg for clarity  
3 of understanding between all parties.

4 In determining a pattern of violations  
5 under the proposed rule, MSHA would review a  
6 mine's history of S&S violations. NSA believes  
7 that MSHA should consider the fact that many  
8 operators have traditionally declined to contest  
9 citations because the legal expenses involved  
10 would significantly outweigh penalties in many  
11 cases.

12 Clearly, if such operators were aware at  
13 the time that such actions could ultimately  
14 result in a pattern finding, they would have  
15 contested many of these S&S citations. In many  
16 cases, such contested citations would have been  
17 reduced to non-significant and substantial  
18 citations.

19 Consequently, NSA urges MSHA to revise the  
20 wording of Section 104.3 to state: "Only final  
21 citations and orders issued after the effective  
22 date of these regulations shall be used to  
23 identify mines with a pattern of violations  
24 under this standard."

25 In Section 104.2 of the proposed rule,

1 initial screening, we believe that the wording  
2 should be revised to provide for an annual  
3 compliance record review of only those mines  
4 having a history of significant and substantial  
5 violations. As written, all mines' records  
6 would be reviewed annually.

7 In addition, NSA encourages deletion of the  
8 portions of this Section (b)(2), (b)(3), and  
9 (b)(4), that call for consideration of evidence  
10 of the mine operator's lack of good faith in  
11 correcting the problem that results in repeated  
12 S&S violations, an accident, injury, or illness  
13 record that demonstrates a serious safety or  
14 health management problem at the mine, and  
15 whether mitigating circumstances exist. These  
16 provisions have no basis in the legislative  
17 history of the Mine Act.

18 NSA objects to the length of time provided  
19 in the issuance of notice portion of this rule,  
20 Section 104.4. The 20-day period provided for a  
21 mine operator to review all documents upon which  
22 the pattern of violations evaluation is based,  
23 provide additional information, submit a written  
24 request for a conference with the MSHA District  
25 Manager, and institute a program to avoid

1 repeated S&S violations is clearly inadequate.<sup>56</sup>

2                 The 30-day period, following the District  
3 Manager's report, that is provided to the  
4 Administrator to issue a decision as to whether  
5 the mine is to be issued a notice of a pattern  
6 of violations is also insufficient.

7                 Additional time should be provided to  
8 comply with the requirements of Section 104.4,  
9 and MSHA should also specify that all reports be  
10 sent by certified mail. Mine operators should  
11 also be given the opportunity to appeal the  
12 Administrator's decision.

13                 Section 104.5, Termination of Notice,  
14 should be revised to include a provision for  
15 termination of notice when an operation is  
16 bought or sold, and the ownership changes hands.

17                 Finally, NSA believes that an operator  
18 should have the option of requesting an  
19 inspection of the mine by personnel from a  
20 different field office or subdistrict than that  
21 conducting the initial inspection.

22                 On behalf of the National Stone  
23 Association, I again thank MSHA and this panel  
24 for holding a public hearing on this most  
25 important subject. We ask that our statement

become part of the permanent record on the

## **Pattern of Violations rule-making process.**

Mr. Klinger and I will try to answer any questions you might have at this time. If we are unable to immediately provide a response, we will be pleased to promptly submit a written response.

MR. ZEUTENHORST: I think your statement was quite clear. Thank you for coming, Mr. Lane.

Our next speaker is Mr. Chris Hamilton for  
the West Virginia Coal Association.

MR. HAMILTON: My name is Chris Hamilton.  
I am Vice-President of the Health and Safety and  
Environmental Affairs for the Western Union Coal  
Association.

For the record, initially, I would like to endorse the comments made by the Pennsylvania Cooperative Coal Association, relative to the inconsistency, lack of uniform interpretation and application of some of the existing enforcement action, namely, the issuance of S&S violations.

The thrust of our comments here today evolves around many of those same concerns

1 articulated here earlier today.

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2 The West Virginia Coal Association is a  
 3 trade association comprised of coal-producing  
 4 companies who collectively account for  
 5 approximately 85 percent of West Virginia's  
 6 underground coal production. Our membership  
 7 also include equipment manufacturers, service  
 8 companies, mine supplies, and land corporations.

9 As an overall comment to MSHA's proposed  
 10 standards and criteria who identified mines with  
 11 a pattern of violation, we request the  
 12 desirability and necessity of this rule-making  
 13 reporting to implement Section 104(e) of the  
 14 Mine Act. That position is advanced, and we  
 15 believe has been bolstered — bolstered more than ever by  
 16 improving safety performance record in the coal  
 17 industry, where we as an industry have  
 18 experienced continual improvement since the  
 19 passage of the 104(e) nearly 12 years ago.

20 In fact, the country rates today appears to  
 21 be about one-third of what they were in 1977.  
 22 We believe, among other critical factors, such  
 23 as improved cooperation and increased efficiency  
 24 level among miners, managers, and inspection  
 25 personnel alike, coupled with the introduction

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of new mine technology, which is resulting in  
even greater gain in both mine health and safety  
and overall mine efficiency.

4                   This is additionally evident, the  
5                   effectiveness of our existing and current  
6                   endorsement practices that are available to  
7                   MSHA.

We have more than adequate administrative controls and enforcement action presently existing to appropriately respond to instances of mine operator recalcitrants, habitual violators of the Mine Health and Safety Act, mine operators experiencing serious safety and health management problems.

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1 have not responded to other enforcement action  
2 under the Mine Act.

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3 The pattern provision is intended to be an  
4 endorsement tool of last resort, and must not be  
5 the subject of vague regulatory provisions.

6 Therefore, we urge the Agency to adopt the  
7 following additional language to Section 104.1.

8 To insure the appropriate use of the  
9 patterns and sanctions, and to assure that the  
10 goals envisioned by Congress with these sections  
11 were adopted or realized. The pattern of  
12 violation enforcement action is intended to be  
13 applied to the new recalcitrant operators who  
14 are chronic violators of the law, and who have  
15 not responded to other enforcement action  
16 available to MSHA under the Act.

17 We also recommend adding a new section,  
18 104.2, to accommodate the essential definition  
19 which we will be submitting for your  
20 consideration and for today's hearing record.

21 First, we recommend that MSHA use the rule-  
22 making procedure to adopt the definition of a  
23 term significant and substantial, provided by  
24 the Federal Review Commission and decision of  
25 the Secretary of Labor or MSHA, the National

1 Gypsum, commonly referred to as Gypsum Decision;  
2 and, secondly, the definition of unwarrantable  
3 failure provided by the Commission of Emery  
4 Mining Corporation v. Secretary of Labor, MSHA.

5 Our recommended Section 104.2 reads as  
6 follows: Significant and substantial violations  
7 of significant and substantial. If there is a  
8 reasonable likelihood that an injury or illness  
9 will occur, as well as a reasonable likelihood  
10 that the injury or illness will be reasonably  
11 serious or fatal, the authorized  
12 representative's secretary will analyze the  
13 hazards created by the violation by first  
14 examining the hazard.

15 Second, the events that must occur to  
16 create the exposure to such hazards; third, the  
17 likelihood of the occurrence of these events;  
18 and, fourth, the likelihood of the cause of such  
19 events will rebut in a reasonably serious injury  
20 or illness.

21 Unwarrantable failure, a violation as a  
22 result of an unwarrantable failure could comply  
23 as to it results from aggravated conduct,  
24 constituting more than ordinary negligence.

25 MSHA, in its background comments, refer

We requested that the attempt of MSHA's preamble language be adopted by the specific conclusion and the standard itself of the above definition for S&S, such in a corporation is consistent with MSHA's adoption of National Gypsum and the Civil Service penalty standard under 30 CFR 100.4, and is necessary to provide judgment then to inspectors, regulatory parties, and even Review Commission important judgment.

The conclusion in these definitions in the  
standard is also important to assure an  
appropriate and consistent enforcement of MSHA  
standards and to assist inspectors in  
independently evaluating each violation to  
determine whether the circumstances meet the S&S  
violation criteria.

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The definition of the term "significant and substantial" has been misapplied to safety violations, and has been essentially ignored with respect to health violations. MSHA's current policy has led to vastly differing applications by different MSHA Districts. In fact, the Agency within statistics will document the disparity and what many would argue represents discriminatory applications.

In support of this statement, we note that  
the number of percentages of S&S violations  
issued in West Virginia, particularly Northern  
West Virginia, MSHA's District 4 out of  
Morgantown -- District 3 out of Morgantown,  
I'm sorry -- and disproportionate in  
comparison with MSHA's remaining Districts, with  
the exception of, perhaps, one slightly to the  
North.

This, categorically, appears to have  
serious health and safety management problems in  
mines of Northern West Virginia. We take strong  
exception to the perception permitted to exist  
by the numbers and strongly urge MSHA to adopt  
our recommended of S&S violations from  
corporations to the rules and regulations.

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1                   In order to bring about increased  
2                   uniformity, consistently and most importantly,  
3                   fairness to MSHA enforcement practices, as an  
4                   additional measure to provoke more consistent  
5                   application of principles for determining S&S  
6                   violation, we urge MSHA to modify its citation  
7                   form to replace or supplement the S&S check box.  
8                   The nature of this form in and of itself has  
9                   often led to the marking of citations, without  
10                  the analysis required by the Commission of the  
11                  inspector.

12                  Modifying this form to require narrative  
13                  responses in place of a check box would promote  
14                  more thorough inspector of analysis of each and  
15                  every S&S finding. We realize and commend MSHA  
16                  for responding to some of the glaring problems  
17                  by recently developing a Policy Letter and  
18                  Inspector Guidelines for all S&S violations.

19                  Review this action as a needed first step,  
20                  but in and of itself it does not provide the  
21                  meaning and stability of being memorialized  
22                  within the regulation itself.

23                  Therefore, we recommend the regulatory  
24                  adoption of definition and language consistent  
25                  with Review Commission Decision, and the need of

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the citation form. It is steps toward appropriate uniform enforcement. We firmly believe that this objective should be an elevated priority of MSHA and a fundamental prerequisite before moving forward with the pattern of violation program and regulation.

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7 We now move to Section 104.3 and 104.4,  
8 initial screening and pattern criteria.

9                         The recommendations in those sections are  
10                         around two basic principles, one to place  
11                         screening at the national level, at the  
12                         appropriate -- before the appropriate  
13                         Administrator; and, secondly, to focus on S&S  
14                         violations associated with more than ordinary  
15                         negligence.

16 As proposed, these sections contained  
17 loosely-worded and vague criteria for which  
18 means are to be evaluated, and determinations  
19 made as to which mines are to be considered for  
20 pattern of notices. This lack of administrative  
21 guidance and definition had potentially  
22 frustrated the administration of the patterns  
23 program, and subjects the same to potential  
24 misapplication and unintentional abuse of  
25 discretionary authority. This could serve to

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1 further compound existing problems surrounding<sup>66</sup>  
2 the key operative terms of the pattern proposal,  
3 namely, the S&S violation and the unwarrantable  
4 failure to avoid these problems, and more  
5 accurately reflect what we believe is the intent  
6 behind those provisions.

7 We urge MSHA to adopt the provisions to  
8 Section 104.3 and 104.4 that were contained  
9 within the written comments filed on behalf of  
10 the National Coal Association by two most  
11 cooperative associations in the American Mining  
12 Congress.

13 The West Virginia Coal Association, in  
14 conclusion, wholeheartedly endorses these  
15 comments that were previously filed on behalf of  
16 the National Coal groups. The remaining  
17 provision of MSHA's proposed pattern of  
18 violation regulation, specifically those without  
19 procedures for the issuance and termination of  
20 the pattern of notice, as well as those which  
21 will adverse a more detailed Section 104.3 and  
22 104.4, will be prevented through testimony next  
23 week.

24 Many members of our organization  
25 participate on the technical committees and

6 /  
1                         regulatory review and drafting committees of  
2                         those national organizations, and we will be  
3                         delivering comments with respect to those  
4                         situations in Denver next week.  
5                         67  
6                         Thank you very much.

6                         MR. ZEUTENHORST: One of the reasons why,  
7                         in a proposal MSHA has the initial screening at  
8                         the District level is felt proposed to the  
9                         structure. is each mine will be evaluated by its  
10                         own merits. If you went to the administrative  
11                         level, you are more less tied to one step  
12                         removed from the people that know best of the  
13                         operations of that mine.

14                         The statistical-type analysis of computer  
15                         printouts, rather than getting out the health  
16                         and safety management practices at that mine,  
17                         that is why MSHA is structuring a proposal. The  
18                         District level would be higher than the...  
19                         subdistrict level and the field office, to  
20                         provide more consistency, and the Administrator  
21                         makes decisions in overall circumstances on both  
22                         control on the metal and the non-metal side.

23                         MR. HAMILTON: We view this more in line  
24                         with, again, what we believe to be the  
25                         congressional intent back in 1987. There are a

1 lot of buzz words that are associated with that 68  
2 intent, habitual violators, recalcitrant  
3 operators, those mines that have serious health  
4 and safety management problems, evidenced by.

We see this as a major significant decision  
by the industry, inconsistent with our unstable --  
of the background and congressional intent, we  
truly envision that there will only be a few  
mines that are issued the pattern notices  
following the enactments of the regulation.

Given the significance of this program, and who it is generally or specifically aimed, we believe that it is a decision that should be made at a higher level, absent any local or regional -- around a level which will insure that all the information surrounding the actual factual circumstances of that operation are factored into the decision-making process.

19                   MR. TEASTER: I have a question. If I get  
20                   this wrong -- I am going to tell you what I  
21                   think you said, and if I am wrong, please  
22                   correct me.

23 You made reference to the scope of this  
24 rule being limited to operators who have not  
25 responded to other enforcement action?

1 MR. HAMILTON: Yes.

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2 MR. TEASTER: I was just curious what you  
3 meant by not responding to other --

4 MR. HAMILTON: Recalcitrant, habitual  
5 violators thumbing their noses at the Act and at  
6 the Agency.

7 MR. TEASTER: I think the way you said it  
8 in the opening statement, I think that we all  
9 agree --

10 MR. HAMILTON: I should point out that we  
11 commend the addition to the regulation. I don't  
12 believe the advanced notice of the proposal  
13 contained such a provision. We think that was,  
14 again, a good, needed first step, but we would  
15 like to see that expanded to more closely  
16 parallel the history and decision that took  
17 place around the adoption of those provisions.

18 MR. ZEUTENHORST: Thank you. ....

19 Any other comments?

20 MR. TUGGLE: My name is Harry Tuggle. I am  
21 here on behalf of the United Steel Workers of  
22 America. I would like to direct some comments  
23 towards some comment that has appeared in the  
24 Mine Reporter, that it was highlighted from the  
25 Agency as far as those that merit some attention.

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1                   And from those, apparently some industry  
2                   comments were that the language for the pattern  
3                   of violation proposed that the rule was too  
4                   broad and encompassed more than what was  
5                   intended by Congress is what I think was stated  
6                   here earlier this morning.

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7                   A legislative history does in fact state  
8                   this particular language on pattern of violation.  
9                   The Secretary shall have the authority for a  
10                  necessarily-broad scope to apply this rule.

11                  Also, there were comments in regard to the  
12                  cost of the proposed rules that were inaccurate,  
13                  and that MSHA failed to include additional cost  
14                  litigation, and so forth, which might be  
15                  staggering.

16                  In essence, if the staggering cost, I  
17                  think, was directed more at prevention versus  
18                  after the fact in fighting the issues, the money  
19                  would be spent in a better direction.

20                  There were also statements that if the S&S  
21                  violation ultimately contributed to a pattern of  
22                  violation, those S&S citations would have been  
23                  contested, and there have been many, many mines  
24                  come and gone in the last 12 years, to where  
25                  many of the operators even here that have had

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operations open up and then mine them up, shut  
them down, and so on. These situations have  
come and gone without any cost under the pattern  
of violation.

5 It goes on to say that the violation should  
6 only be applied as of the time stated as this  
7 given rule. No less than a period of time to  
8 exceed two years, I think MSHA has already  
9 stated in their preamble to these regulations  
10 that they may be looking at a two-year area  
11 here, where in fact they will, if there are no  
12 S&S criteria or no criteria to set up a pattern.  
13 They may not back all the way into the history,  
14 but it may be -- two years may be a trigger  
15 mechanism to go ahead and look back at the five,  
16 six, ten years, whatever it might be.

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1 employees, no matter who was at the hilt, but  
2 this particular corporation or whatever it might  
3 be has a habitual situation of inserting people  
4 there that do not have a concept of what is  
5 going to become S&S, or what is going to become  
6 a concept of a pattern.

Also, there are commenters that suggested  
that a notice be determined when an inspection  
by MSHA results in no S&S violations in the area  
of the mines involved in the pattern. I think  
it was a clear intent of Congress, and I think  
it is a clear intent of the application of MSHA  
to apply that on a mine-wide basis, that once  
they have an inspection of the mine in its  
entirety, then that may be a point in time when  
the pattern system would cease, not just to the  
given area of where a particular violation  
begins to cause the pattern itself.

19                   Others believe that the mine operator  
20                   should have a right to request personnel from  
21                   different fields or districts or offices to  
22                   perform final inspection for those who perform  
23                   the initial inspection. This is getting, I  
24                   think, quite complicated, by the same token.

**25** The miner representative should have an

9 It does not appear to be a conceivable way  
10 to apply something like that. It would simply  
11 appear that somebody says we will bring somebody  
12 from outside the District that we are aware that  
13 is less stringent, less technical about the  
14 situation than given people here in our District.  
15 We would not concur with something like that.  
16 The one area of the pattern criteria, where  
17 there are three instances, violations of the  
18 same standard, violations of standard related to  
19 the same hazards, or violations caused by  
20 unwarrantable failure to comply.

From my understanding, from MSHA, is that  
if you have a number of violations unrelated to  
the same standard in a given mine, the only way  
you may link those will be by unwarrantable  
failure.

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MR. ZEUTENHORST: That is how it has been  
proposed, yes.

MR. TUGGLE: It is the Steel Workers' position that there should be a fourth criteria there; and I don't know if you want to play number games or what, but even if there is a great number of S&S violations throughout the operation, it still reverts back to, and it may be lower management problems. It is something that should trigger MSHA, and should trigger the mine operator to evaluate, even though they are not in fact unwarrantable figures. That is something to tie this together.

With that, I have no further comments

MR. ZEUTENHORST: Just one question: Would you care to comment on the proposed provision to allow the District Manager to put -- to recognize that an operator may be advancing down the pattern road, to put that operator on some written notice that he is developing a pattern of violation but has an opportunity to develop a program, a remedial program and a corrective program.

Do you have a comment on that?

MR. TUGGLE: Yes. The bottom line in this

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1                   is to find a way to, number one, correct the  
2                   problem within any given mining operation but  
3                   within that system.. As was brought out by  
4                   United Mine Workers, we had a problem with that  
5                   if in fact it comes in a situation of a District  
6                   Manager allowing a system to get beyond the  
7                   scope of what it was intended for, and wind up  
8                   with repeated 90 days, repeated 90 days, and  
9                   never ending, to see if in fact a program works.

10                  By the same token, along those lines, if an  
11                  operator is receiving a notice based on the fact  
12                  that a resolved S&S citation, and he is given  
13                  notice under a pattern, and it is only based on  
14                  resolved issues; if in fact he is under notice  
15                  at a given time, at least any particular S&S  
16                  citation that comes about during that notice and  
17                  that 90-day review, I think the District  
18                  Managers should have the wherewithal to go ahead  
19                  and advance that to the Administrator, and go  
20                  from there. Even though it went into a hearing  
21                  or whatever, it would be an additional trigger  
22                  that would in fact cause that District Manager  
23                  to move from correction.

24                  There is also a comment to elaborate one  
25                  point further here about the patterns being on a

1                   national level. I think if they, by the 76  
2                   proposal, they are in fact on a national level.  
3                   The national screening and national review,  
4                   someone has got to do to the legwork and the  
5                   groundwork, and that is by the inspectors, then  
6                   to the District Managers, which oversee his  
7                   inspectors; and based on the information he has  
8                   gathered, it is forwarded then to the  
9                   Administrator on a national level.

10                  Just to say that they should develop a  
11                  whole new office and new monies should be  
12                  developed for a whole new department in MSHA for  
13                  a Pattern Violation Review Board and a review  
14                  system is not going to serve the purpose in  
15                  getting the pattern violation across as Congress  
16                  intended.

17                  MR. ZEUTENHORST: Thank you, Mr. Tuggle.

18                  Are there any further personnel who would  
19                  like to make a statement or testimony this  
20                  morning?

21                  In closing, I would like to express our  
22                  appreciation for you sitting out this morning  
23                  with the cold room and everything. Your  
24                  presence here today shows the importance you  
25                  attach to these activities. On behalf of the

1 panel, I would like to thank you for coming. 77  
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3 This hearing is closed.  
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5 (Whereupon, at 1:10 p.m., the hearing was  
6 concluded.)  
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MAXINE JACOBY & ASSOCIATES

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C E R T I F I C A T E

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I, JENIFER PENNLINE, a Notary Public - Court  
Reporter for the Commonwealth of Pennsylvania, do hereby  
certify that the said hearing was taken at the time and  
place stated herein; and that the said hearing was recorded  
stenographically by me and then reduced to typewriting under  
my direction, and constitutes a true record of the testimony  
given at the time of the hearing.



Jenifer Pennline  
MAXINE JACOBY & ASSOCIATES  
500 Renshaw Building  
9th & Liberty  
Pittsburgh, PA 15222  
(412) 765-3133

My Commission Expires:

1                   UNITED STATES DEPARTMENT OF LABOR  
2                   Public Hearing  
3                   on  
4                   Proposed Rules for  
5                   PATTERN OF VIOLATIONS  
6  
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8  
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22                   12:30 p.m.  
23                   November 8, 1989  
24

25                   Stouffers Airport Hotel  
                     Denver, CO

21 NOV 1989



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## P R O C E E D I N G S

12:30 p.m.

3 MR. RICHARD ZEUTENHORST: Good afternoon. I am  
4 Richard Zeutenhorst, the Associate Director of the Mine Safety  
5 and Health Administration's Office of Standards, Regulations,  
6 and Variances. I will be your moderator this afternoon on  
7 this public hearing on MSHA's proposal to establish procedures  
8 to identify mines with a pattern of violations.

With me on the panel this afternoon are, to my immediate left, Dave McConnell from the Labor Department's Office of the Solicitor; to my immediate right, Ernie Teaster from MSHA's Office of Policy Planning and Evaluation; and, to my far right, Mary Ridley from my office.

14                                  The purpose of this hearing, as stated in the  
15 Notice of Hearing, is to receive relevant comments and data on  
16 MSHA's pattern of violations proposed rule which was published  
17 in May of this year. Most of the major issues arising from  
18 the proposal were stated in the October 19th Federal Register  
19 notice announcing this hearing.

20                   This is the second of two public hearings. The  
21 first hearing was held last Wednesday, November 1st, in  
22 Pittsburgh, Pennsylvania.

23                   These hearings are being held in accordance  
24 with Section 101 of the 1977 Federal Mine Safety and Health  
25 Act, and it is the practice of this Agency that formal rules

1 of evidence will not apply. Today's proceeding will be  
2 conducted in an informal manner. Those of you who notified  
3 MSHA in advance will be able to make your presentations first  
4 and upon request will be followed by others who wish to have  
5 an opportunity to speak.

6 Anyone who has not previously requested to  
7 speak should indicate their intention to do so by notifying  
8 the panel.

9 During this proceeding, the hearing panel will  
10 be available to address questions from the speakers. To  
11 ensure an accurate record, if you do have questions please  
12 come to the podium and begin by clearly stating your name and  
13 organization. In order to clarify certain points, the panel  
14 may ask questions of the speakers. Time will also be made  
15 available, as is the usual practice in MSHA's hearings, for  
16 those wishing to make additional statements.

17 As moderator, I may exercise discretion to  
18 exclude irrelevant or unduly repetitious material and  
19 questions.

20 A verbatim transcript of this hearing is being  
21 taken, and it will be made a part of the rule-making record.  
22 The hearing transcripts, along with all the comments that MSHA  
23 has received to date on the proposed rule, will be made  
24 available for review by the public. However, if you wish a  
25 personal copy of the hearing transcript, you may wish to make

1 your own arrangements with the Reporter.

2 MSHA will also accept additional written  
3 comments and other appropriate data on the proposed rule from  
4 any interested party, including those who have not presented  
5 oral statements. These written comments may be submitted to  
6 me during this hearing or sent to the address listed in the  
7 hearing notice. All written comments and data submitted to  
8 MSHA will be included in the rule-making record. The record  
9 will remain open until December 8, 1989, to allow for the  
10 submission of post-hearing comments and data.

11 At this point, if there is anybody who was not  
12 at this morning's hearing, I would ask that sometime during  
13 this afternoon you sign our attendance sheet.

14 By way of background, this proposal was  
15 developed to implement Section 104(e) of the 1977 Mine Act.  
16 This provision addresses mines with a pattern of violations,  
17 which are of a nature that could have significantly and  
18 substantially contributed to the cause of health or safety  
19 hazards.

20 Section 104(e) requires that a notice be issued  
21 to a mine operator with a mine that has a pattern of  
22 significant and substantial, or S & S violations. Once the  
23 Section 104(e) pattern notice is issued, any inspection within  
24 90 days which reveals another S & S violation results in an  
25 order to withdraw all persons from the affected area of the

1 mine until the violation is abated.

2                 The statute further requires that withdrawal  
3 orders continue to be issued for subsequent S & S violations  
4 until an inspection of the entire mine reveals no further  
5 S & S violations.

6                 The 1977 Mine Act does not define "pattern of  
7 violations", but rather authorizes the Secretary to make such  
8 rules as necessary to establish criteria for determining when  
9 a pattern exists. Congress provided the Secretary broad  
10 discretion in determining these criteria.

11                MSHA first published a proposed rule to  
12 implement the statutory pattern of violations provisions in  
13 1980. However, this proposal was withdrawn in February, 1985,  
14 in an advance notice of proposed rule making. The 1985 notice  
15 was intended to address many of the concerns expressed about  
16 the 1980 proposal, as well as to take into consideration the  
17 Agency's enforcement experience under the 1977 Act. On  
18 May 30th of this year, MSHA published the proposed rule we are  
19 here to discuss.

20                MSHA believes that three principles are central  
21 to this rule making. First, based upon the legislative  
22 history of the 1977 Mine Act, it is clear that the pattern  
23 provisions are directed at only a few mines. This is not a  
24 rule with pervasive application. The mines addressed are  
25 those where S & S violations are abated when cited, but

1 chronically recur without the mine operator taking effective  
2 preventative action. Congress intended that the pattern  
3 provision protect miners from such disregard for their safety  
4 and health. That is the Agency's intent with this rule  
5 making. Second, the pattern must include procedures for fair  
6 and full notice, allowing all parties to respond to MSHA's  
7 determination that a particular mine may have a pattern of  
8 violations. Third, to be truly effective, a pattern rule must  
9 have a strong remedial or corrective effect. It must get the  
10 mine operator's attention with the ultimate goal being to  
11 restore safe and healthful working conditions at the mine,  
12 rather than closing it down.

13 Because S & S violations form the basis for  
14 finding a pattern of violations, many commenters have  
15 repeatedly stated that a more uniform application of the  
16 criteria for determining what violations are S & S is needed  
17 in MSHA's enforcement activities. These commenters have  
18 suggested that the criteria for S & S violations be defined in  
19 the rule, as it was by the Federal Mine Safety and Health  
20 Review Commission in the National Gypsum case. MSHA agrees  
21 that citations for S & S violations, which in part form the  
22 basis of a pattern determination, must be consistent with the  
23 definition of S & S violations established by the Review  
24 Commission.

25 As recently as September 21st of this year,

1 MSHA has reaffirmed this position in a Program Policy Letter  
2 for metal, nonmetal, and coal mines. That policy letter  
3 states, in part, that: "In determining whether a violation  
4 could 'significantly and substantially contribute to the cause  
5 and effect of a mine safety or health hazard', inspectors must  
6 first find that, first, an injury or illness would be  
7 reasonably likely to occur if the violation were not  
8 corrected; and second, if the injury or illness were to occur,  
9 it would be reasonably serious. Both of these findings must  
10 be made before a violation can be designated as 'significant  
11 and substantial'."

12 MSHA continues to believe that including a  
13 definition in this rule of what constitutes an S & S violation  
14 is neither appropriate nor necessary. In accordance with  
15 prevailing case law, each violation must be independently  
16 evaluated by the inspector to determine whether the  
17 circumstances meet the S & S criteria. The S & S criteria do  
18 involve subjective elements that must be resolved by the best  
19 judgment of the inspector. Under any particular  
20 circumstances, the inspector's judgment, like that of any  
21 of us, may result in differences of opinion as to the validity  
22 of that judgment. In that respect, the citations and orders  
23 leading to a pattern of violations notice would not differ  
24 from those involved in the Agency's other enforcement actions.

25 Although MSHA remains committed to working

1 toward a consistent assessment of the degree of hazard posed  
2 by violations, and hence more consistency among districts,  
3 there will always be some variation from inspector to  
4 inspector. The Agency intends, however, that such variation  
5 will play no significant role in whether a mine is placed on a  
6 pattern of violations. The key element, rather, must be  
7 whether the mine has a serious safety and health management  
8 problem that is manifested in a chronic cycle of violations  
9 and abatements without any effort being made by mine  
10 management to restore the mine to effective safe and healthful  
11 condition.

12 We will now begin with those speakers who have  
13 requested to appear today. I will read the entire list so  
14 that you may know the order in which your name appears. As  
15 previously stated, if your name does not appear on the list,  
16 you will have an opportunity at the end of this hearing to  
17 make a presentation.

18 This afternoon, we have John Caylor, from  
19 Cypress Coal Company; Ron Wooten and Harold Barnes,  
20 representing the American Mining Congress, Bituminous Coal  
21 Operators' Association, and the National Coal Association;  
22 John Reeves from the Midcontinent Resources; representing the  
23 United Mine Workers of America, Linda Raisovich-Parson, Bob  
24 Butero, Crecencio Salazar, Larry Neil, Linda Koile-Fischbeck;  
25 and from Homestake Mining Company, Harold Barnes; and finally,

1 from the Colorado Mining Association, Dan Larkin.

2 As you begin to speak, please come forward and  
3 spell your name for the Reporter. If you have a prepared  
4 testimony, I would appreciate if you would provide the hearing  
5 panel a copy and also a copy to the Reporter.

6 We will now hear from our first witness,  
7 Mr. John Caylor from Cypress Coal Company, and Mr. Hank Moore.

8 MR. JOHN CAYLOR: I am John Caylor,  
9 C-A-Y-L-O-R, Manager of Safety and Industrial Hygiene for  
10 Cypress Coal Company. And appearing with me is Hank Moore  
11 with Buchanan and Ingersoll, a law firm out of Pittsburgh,  
12 Pennsylvania.

13 Mr. Chairman and panel, Cypress Coal is  
14 engaged, through its subsidiaries and affiliates, in the  
15 underground and surface mining of coal at various locations in  
16 Colorado, Pennsylvania, Utah, West Virginia, Wyoming, and  
17 Kentucky. We will produce approximately 15 million tons of  
18 coal in 1989. Its operations are located in a number of MSHA  
19 districts, including Districts 2, 4, 7 and 9. We join and  
20 generally adopt the comments and testimony submitted jointly  
21 by the National Coal Association, the American Mining  
22 Congress, and the Bituminous Coal Operators' Association. In  
23 addition, we would also submit the following testimony.

24 We believe that MSHA is confronted by a task of  
25 monumental proportion as it tries to draft regulations

1 concerning pattern of violations that are fundamentally fair  
2 and achieve the purpose of the standard. In some respects,  
3 this task is made difficult by the factors that are rooted in  
4 the historical enforcement of the Act. These factors include  
5 the fact that almost all violations can be, in the view of  
6 some inspectors and Agency personnel, designated "significant  
7 and substantial". And the fact that there is a substantial  
8 disparity between enforcement in various MSHA districts.

9 It is our firm belief that the imposition of a  
10 patter of violations on a particular mine will be, in effect,  
11 a regulatory "death penalty". We urge MSHA to use extreme  
12 care in developing regulations pertaining to a pattern of  
13 violations, and order that only the truly recalcitrant  
14 operators, the intended targets of this statutory provision,  
15 be subject to the imposition of a pattern of violations  
16 notice.

17 There an be no doubt that the impact of the  
18 adoption of a pattern of violations regulations will be great.  
19 It appears to us that the imposition of a pattern notice will  
20 make it virtually impossible for an affected mine to continue  
21 in operation. Most coal mines that produce over 500,000 tons  
22 of coal a year can reasonably expect to receive between 200  
23 and 500 violations a year. This figure is expected to  
24 increase in the future. It is our experience that the number  
25 of inspector days and the number of violations is increasing,

1 particularly in the coal industry as mines close and Agency  
2 personnel are retained.

3 For example, in District 9 the total number of  
4 citations have risen from 1,000 in fiscal year '81-'82 to  
5 almost 6900 in fiscal year '87-'88. A significant increase.  
6 S & S citations rose during the same period from 201 to 4,746;  
7 an even greater increase. During the same period, also,  
8 orders rose from 47 to 972. In our company, while working  
9 almost the same number of man-hours, inspector days have gone  
10 up from 875 in 1986 to an estimated 1,117 in 1989. One of our  
11 operations averages an inspector for almost every working day  
12 of the year. Many mines will experience more inspector days  
13 than even that.

14 If such a mine were on a pattern, it could  
15 reasonably expect to receive one or more S & S citations for  
16 every working day of the year. No mine could remain  
17 competitive in such situations, and the imposition of a  
18 pattern would inevitably mean the closing of the mine.

19 Section 104(e)(3) of the Act only allows  
20 termination of a pattern notice if a mine undergoes a complete  
21 inspection without receiving a violation designated as  
22 "significant and substantial". As that term has been  
23 generally applied by the Agency, it would be virtually  
24 impossible for an operator in a mine of any size to achieve  
25 such a "clean inspection".

1                   Some of the comments referred to in the Federal  
2 Register notice for this hearing discussed the issue of  
3 whether a clean inspection could be based upon a number of  
4 partial inspections of the mine, as opposed to a quarterly  
5 complete inspection, as is the case with unwarrantable failure  
6 chains. There were also comments by the UMW that an operator  
7 might escape a pattern notice without such a partial  
8 inspection, and then go back to get an S & S violations again.  
9 Such discussions are purely academic, in our view. Once on a  
10 pattern, no operator will ever escape.

11                  The National Coal Association and the American  
12 Mining Congress have supplied figures to show that, in some  
13 MSHA districts, over 80 percent of the violations issued are  
14 S & S. It is inconceivable that even in districts with lower  
15 S & S rates, such as 50 percent, that any mine could survive a  
16 complete inspection without getting an S & S violation.

17                  Once a pattern were imposed, an operator could  
18 engage in a tremendous effort to correct the pattern, but it  
19 is highly unlikely that termination of the pattern notice  
20 could ever be achieved, unless MSHA begins to consistently and  
21 persistently apply the standards of the National Gypsum  
22 decision in all of its districts, and return to the 20 percent  
23 S & S rate that occurred immediately after the issuance of  
24 that decision.

25                  Despite the fact that the discussion

1 accompanying the proposed regulations suggested that the  
2 abatement of violative conditions, not punishment, is the  
3 object of the imposition of a pattern, it must be recognized  
4 that as S & S is currently interpreted and applied, the  
5 remedial purpose can only be accomplished prior to the  
6 imposition of the pattern notice. Once it is imposed, there  
7 will be little realistic opportunity for an operator to  
8 improve its performance sufficiently to escape the pattern.  
9 We doubt that few quarterly inspections at coal mines have  
10 ever been conducted without the issuance of an S & S  
11 violation, even in the days right after the National Gypsum  
12 case was decided.

13 We recognize and understand that the pattern of  
14 violation regulations will be implemented by an inspector  
15 force that has developed their own entrenched views of what  
16 terms, such as significant and substantial, mean. We expect  
17 that it would be very difficult to make major changes in how  
18 those terms are interpreted at the mine level. Such a  
19 reduction did occur immediately after the National Gypsum  
20 decision, but the S & S rate has returned to the rates that  
21 were prevalent prior to that decision. We think, however,  
22 that an effort should be made to provide the inspectors more  
23 concrete guidance on what such terms really mean.

24 MSHA has recently sought to provide some  
25 guidance to inspectors in Program Policy Letter P89-I-3. We

1 don't know if these guidelines will, in fact, cause inspectors  
2 to more realistically evaluate the potential for hazards  
3 caused by a violation. We suspect it will not do so because  
4 of the failure to actually define "reasonable likelihood" and  
5 the "reasonably serious injury"; two terms which are integral  
6 to the definition of S & S adopted by the Review Commission.

7 Inspectors often define a "reasonable  
8 likelihood" as one which is merely possible. This is not  
9 consistent with the dictionary definition of these words,  
10 which would indicate that they suggest probability, as opposed  
11 to mere possibility. A definition indicating that the  
12 occurrence of an event must be probable would provide  
13 inspectors with some realistic guidance as to the meaning of a  
14 term that is crucial to the determination of whether or not a  
15 violation is significant and substantial. This sort of  
16 definition of "likely" and "likelihood" is consistent with the  
17 way the courts have defined such terms.

18 The Program Policy Letter suggests that the  
19 likelihood of an injury should not be defined in terms of  
20 "mathematical chance". While we do not suggest that  
21 percentages of occurrence is the best way to define the terms,  
22 we believe that some guidance to the effect that the term  
23 "reasonably likely" suggests "a probability of occurrence is  
24 required". Too often an inspector's determination of  
25 "reasonable likelihood" is based on a chain of events that is

1 highly improbable.

2                   For these reasons, we suggest that "reasonable  
3 likelihood" be defined as: "That it is more probable than not  
4 that the continuation of normal mining operations would,  
5 within the reasonably foreseeable future, result in an injury  
6 or illness.

7                   The Program Policy Letter also provides little  
8 guidance in what is a "reasonably serious injury". The  
9 letter essentially appears to suggest what an inspector must  
10 find as to the seriousness of an injury in order to sustain an  
11 S & S finding, rather than providing guidance as to what is a  
12 reasonably serious injury. It is a defensive definition.  
13 Despite the difficulty of definition, some efforts must be  
14 made to provide guidance beyond this to the inspectors.

15                  What must be avoided is rote determination of  
16 S & S. Many inspectors write all violations of such types --  
17 for example, roof control and ventilation -- as S & S. This  
18 sort of blanket characterization must be avoided. Even the  
19 Agency, as a matter of policy, has fallen into this trap by  
20 evaluating all respirable dust violations as S & S, without  
21 evaluating the level of exposure or the use of respiratory  
22 equipment.

23                  Despite our concurrence in the industry's  
24 attempts to define S & S in a fashion to promote uniformity of  
25 enforcement, we do not believe that it is possible to achieve

1 complete uniformity of application of any definition of such  
2 terms, given the wide disparity in enforcement practices that  
3 now exist. We do not believe that defining, or redefining,  
4 these terms will completely remedy the inconsistency of  
5 enforcement practices, nor do we believe that rotating  
6 district managers will solve this problem.

7 We are particularly concerned about this issue  
8 because our underground coal mines are located in two of the  
9 MSHA districts with the highest S & S rates. We are concerned  
10 that mines in these districts will suffer the imposition of a  
11 pattern violation, merely because of their location, even if  
12 they are not the recalcitrant operators for which the pattern  
13 notice is intended.

14 We believe than an effort must be made to take  
15 into account the disparity of S & S and "unwarrantable rates"  
16 in the various districts between coal and metal/non-metal  
17 operations. One method of doing this would be to compare  
18 similar mines in the same district or subdistrict since the  
19 disparities in enforcement would not be as great. Such  
20 comparisons should be to mines of similar size and type.  
21 Older mines are necessarily not comparable in violation rates  
22 to newer or smaller mines. We have described examples of this  
23 type of provision in our earlier written comments. Various  
24 methods could be used, including comparisons of the district  
25 averages of S & S violations.

1                   We think it of extreme importance that the  
2 steps leading to the issuance of a pattern notice provide as  
3 much opportunity for notice and provision of information by  
4 the operator as possible before the issuance of the pattern  
5 notice. We are concerned that the Agency does not truly grasp  
6 the import of what the imposition of a pattern notice will  
7 mean.

8                   As an example, the Agency has, in the proposed  
9 rules, established short deadlines for actions by an operator.  
10 Twenty days to request a conference after notification of a  
11 potential pattern; 10 days to hold such a conference; and 30  
12 days for the Administrator to issue a decision. We suggest,  
13 as described in the industry's comments, that such deadlines  
14 should be expanded. The Agency in the proposed rules indicate  
15 that these deadlines were short because of the presence of a  
16 serious safety hazard. They should not be so short as to  
17 promote the making of hasty decisions. They should not be so  
18 short as to deprive the operator of due process. The  
19 determination that a pattern exists is probably an  
20 irreversible and unappealable decision. No rush to judgment  
21 is appropriate under such circumstances.

22                  Finally, we are concerned with the generality  
23 of criteria in the initial screening, and the criteria for  
24 issuance of a notice in proposed Sections 104.2 and 104.3.  
25 Those provisions simply list the factors that will be

1       considered, without indicating how they would be weighed.  
2       While we recognize that the identification of recalcitrant  
3       operators requires evaluation of subjective and objective  
4       factors, we are extremely concerned with the lack of  
5       substantive criteria. Given the history of unequal  
6       enforcement of the Act, as shown by the S & S and  
7       unwarrantable rates, we are concerned with unequal application  
8       of the very vague criteria outlined in the proposed  
9       regulations. We recognize that the 1980 advance notice of  
10      proposed rule making drew criticisms as being too complex and  
11      mathematical. But it seems to us that the proposed rules have  
12      gone too far in the opposite direction.

13           The United Mine Workers has suggested in its  
14      comments that an operator should be put on a pattern notice  
15      based solely on the number of S & S violations at a mine. In  
16      support of these comments, they refer to the legislative  
17      history of the Act which suggests that an operator's intent  
18      need not be considered. The difficulty with this is that  
19      there is no indication that Congress had any perception of the  
20      impact of the pattern notice, given the way that the S & S  
21      pragmatism is being administered by MSHA. If the number of  
22      S & S violations were the sole criteria for a pattern notice,  
23      every underground coal mine in the country could be placed on  
24      a pattern. Because of the way S & S has been applied, the  
25      existence of a high S & S rate is not necessarily indicative

1 of a recalcitrant operator.

2 The Agency is faced by a tremendous challenge.  
3 It must seek to correct longstanding enforcement practices  
4 that deviate from a Congressional intent, and seek to  
5 construct an enforcement tool that is consistent with the  
6 intent of the Act.

7 Finally, with respect to the specific criteria,  
8 we do not believe that 107(a) orders, past violations, or  
9 violations that are not final should be considered. Section  
10 107(a) orders may not be issued with accompanying citations,  
11 and may, in fact, occur as a result of a natural phenomena  
12 which the operator cannot control. Imminent danger orders  
13 should not be used in any part of the pattern process, unless  
14 they result from a condition that could have been addressed in  
15 advance by the operator.

16 In its discussion, the Agency indicated it  
17 would consider prior violations. It is our belief that the  
18 adoption of pattern regulations provides an opportunity for  
19 the Agency to reassess its enforcement practices and criteria.  
20 Even if this is not done formally by the Agency, it may be  
21 that individual inspectors will do so in light of the real  
22 potential of the imposition of a pattern notice. In light of  
23 this, it would be more appropriate for all operators to be  
24 able to be measured by the same standard, something which has  
25 not previously occurred.

1                   We, therefore, believe that only final  
2 violations should be considered. The UMWA has suggested that  
3 an operator will contest all S & S violations in order to  
4 avoid a pattern. Such comment is not realistic. Even if an  
5 operator contested all S & S violations, the success rate of  
6 such contest is now in the neighborhood of only 20 to 30  
7 percent. If an operator contested all S & S violations, that  
8 rate would decrease, making it unlikely that any operator  
9 could avoid a pattern by such device. Moreover, a contest of  
10 S & S citation usually takes less than a year, making it  
11 likely that contested violations would be available for  
12 consideration in a pattern where two years of violations are  
13 considered.

14                  Further to consider violations that are not  
15 final is to make it possible that an operator could be put on  
16 a pattern based on citations or orders that were not valid,  
17 and such an approach to a pattern would be fundamentally  
18 unfair.

19                  In conclusion, we recognize that the Agency  
20 will move forward with the pattern regulations. We urge to  
21 consider carefully the safeguards necessary to prevent the  
22 imposition of an improper pattern notice. Imposition of the  
23 sanction of the magnitude of a pattern notice requires  
24 deliberate and careful consideration.

25                  We trust that our comments that have been

1 offered here will be accepted and considered in the light in  
2 which they were given, one of constructive review. It is  
3 imperative that such important proposals be given every  
4 consideration to become good regulations that are fairly and  
5 consistently applied.

6 Thank you for the opportunity for this  
7 discussion.

8 MR. ZEUTENHORST: Thank you.

9 Early on in your statement, you stated that it  
10 is your belief that many inspectors only look at possibility,  
11 in judging S & S. I'm sure you know, although we don't use  
12 the term "probable" in the Program Policy Letter P89-I-3,  
13 MSHA's official policy is stated there that, quote, "It is not  
14 enough to find that an injury or illness is only possible".  
15 We're working hard on getting a more uniform application, but  
16 as I said in the opening statement, it's a long haul. But we  
17 are looking beyond, on S & S, as something more than is merely  
18 possible.

19 You also made some statements about the need to  
20 compare mines of similar sizes. We did some of that, as you  
21 know, back in 1980. One of the reasons that the Agency has  
22 not chosen to pursue that course of action thus far in the  
23 rule making, is that, as we stated in -- I think in both the  
24 advance notice and the proposed rule -- keeping in mind  
25 Congressional intent were targeting a few mines, we wanted to

1 look at each mine on its own record, and not come up with a  
2 quota system. When you begin to quantify mines as "X" number  
3 of this tonnage and that tonnage, you begin to shift into an  
4 area where it looks as if there should be a certain percentage  
5 always on pattern. We don't look at it that way. We look at  
6 it that the pattern mine is going to be evident, and should be  
7 dealt with on its own merits, rather than on how it fits into  
8 any sort of statistical system.

9                   Do you have any questions?

10                  MR. ERNIE TEASTER: No, I'd just like to, if  
11 Mr. Caylor would give me an opinion, he indicated that some  
12 mines are going to get from 2 to 500 violations.

13                  Do you have any opinion as to how many of those  
14 citations that are issued would be issued and corrected on the  
15 spot?

16                  MR. CAYLOR: No, I don't. I would imagine that  
17 a great percentage of them would be.

18                  MR. TEASTER: Thank you.

19                  MR. CAYLOR: In addition to that, a great many  
20 of those that were corrected on the spot would be S & S  
21 violations.

22                  MR. TEASTER: Well, I guess what I'm after, if  
23 we're finding them and fixing them right there on the spot,  
24 then if you were in the pattern that would not have any effect  
25 on that portion of the citation, because you're stopping the

1 piece of equipment or the affected area of the mine and making  
2 the correction on the spot. And that's what you would be  
3 doing under a pattern.

4 MR. CAYLOR: Okay.

5 MR. TEASTER: Thank you.

6 MR. CAYLOR: But, without knowing what the real  
7 numbers are, you always have the opportunity for those not to  
8 be able to be corrected on the spot --

9 MR. TEASTER: Yes, I understand that.

10 MR. CAYLOR: -- and not knowing the number,  
11 I'd --

12 MR. TEASTER: I was just curious as to what  
13 percentages we're talking about.

14 MR. CAYLOR: Right. No, I don't know the  
15 percentages.

16 MR. TEASTER: All right.

17 MR. DAVE MCCONNELL: I'd like to state for the  
18 record, you had indicated earlier that the Agency doesn't take  
19 into account the use of personal protective equipment in  
20 designating respirable dust citations as S & S, and Richard  
21 mentioned the new Program Policy Letter the Agency issued in,  
22 I think, September. That policy indicates, also, that the  
23 proper use of personal protective equipment should be taken  
24 into account, as well as any other evidence that miners were  
25 not exposed to the "hazard posed by the excessive

1 concentration of the harmful substance".

2 MR. CAYLOR: You still have, on the record  
3 though, the policy of how health violations are to be treated,  
4 and unless I'm wrong, the policy still is that the health  
5 violations will be S & S violations.

6 MR. MCCONNELL: I think that's generally true,  
7 yes.

8 MR. ZEUTENHORST: Thank you, Mr. Caylor.

9 Our next speakers are representing the National  
10 Coal Association, Bituminous Coal Operators' Association, and  
11 the American Mining Congress. And they're Mr. Ron Wooten and  
12 Mr. Harold Barnes.

13 MR. RONALD WOOTEN: Thank you, Mr. Chairman.

14 My name is Ronald L. Wooten, and that's  
15 W-O-O-T-E-N. I'm the Vice President of Safety, Consolidation  
16 Coal Company and Vice Chairman of the National Coal  
17 Association, Coal Safety and Health Committee. Sharing the  
18 responsibility with me for presenting the industry position is  
19 Harold Barnes, Corporate Manager, Health and Safety, Homestake  
20 Mining Company, and Chairman of the American Mining Congress  
21 Metal/Non-Metal Safety Committee. Mr. Barnes and I will be  
22 alternating our presentations this afternoon.

23 Accompanying us are Kevin R. Burns, Counsel for  
24 the American Mining Congress; Robert L. Vines, Vice President,  
25 Health and Safety, Bituminous Coal Operators' Association,

1 Inc.; and Bruce Watzman, Vice President, Health, Safety and  
2 Human Resources, National Coal Association.

3 On behalf of the American Mining Congress,  
4 Bituminous Coal Operators' Association, Inc., and National  
5 Coal Association, we greatly appreciate this opportunity to  
6 present our views on the Agency's proposal to promulgate the  
7 rules and regulations for pattern of violations.

8 The member companies of these associations  
9 produce most of the nation's coal, metals, industrial and  
10 agricultural minerals. Therefore, we have a vital interest in  
11 the Mine Safety and Health Administration's rule making effort  
12 to develop the most severe enforcement tool available to the  
13 Agency. While our comments contain recommendations within the  
14 framework established by MSHA, we strongly suggest that the  
15 proposed regulations are not necessary. MSHA's existing  
16 enforcement tools are sufficient.

17 The need for this rule, currently, is not as  
18 evident as in 1977 when the "pattern" amendment was enacted.  
19 Through enforcement of the 1977 Act, and the collective  
20 efforts of the industry, MSHA, and labor, great strides have  
21 been achieved in the mine safety and health.

22 Through enforcement of the 1977 Act, the few  
23 pre-1977 recalcitrant mine operators are either no longer in  
24 business or have improved their health and safety programs.  
25 We believe that if there are any remaining recalcitrant mine

1 operators, they have not yet been subjected to the intense  
2 inspections and repeated and unwarrantable failure, failure  
3 to abate, or imminent danger closure orders available to MSHA.  
4 Pattern provision enforcement is simply not necessary when  
5 viewed in light of the mining industry in 1989.

6 Without prejudice to our position that the  
7 Secretary should deem that no rules are necessary to establish  
8 criteria for determining when a pattern exists, or that such  
9 rules could be constitutionally suspect, we will present the  
10 following comments for your consideration.

11 More than 100,000 S & S citations are expected  
12 in 1990. These citations are issued as a matter of course in  
13 many MSHA districts, and they have come to be applied to  
14 violations and alleged violations which are not significant  
15 and substantial in a sense envisioned by Congress. We believe  
16 that unless recalcitrance is the controlling factor upon  
17 which the pattern enforcement tool is based, every large mine  
18 operator could be considered a potential pattern candidate,  
19 despite the effectiveness of their safety programs.

20 The legislative history of the Mine Act, and  
21 the significant safety improvements since 1977, clearly  
22 indicate that the use of the pattern enforcement tool, if  
23 utilized at all, should be extremely limited.

24 We have prepared an outline of our position  
25 concerning the proposed pattern of violations standard, and

1 our presentation today will follow this outline.

2 At this point, I would like to introduce  
3 Mr. Harold Barnes to present the next portion of the  
4 industry's testimony.

5 MR. HAROLD BARNES: Thank you, Ron.

6 Mr. Chairman and panel, we believe that  
7 Congress intended to limit Section 104(e), pattern of  
8 violations, enforcement to those few, if any, recalcitrant  
9 mine operators that have not responded to other MSHA  
10 enforcement tools.

11 In the absence of imminent danger, Congress  
12 intended for MSHA to use its closure authority sparingly.  
13 Congress made it clear that MSHA's authority to issue  
14 withdrawal orders, based on Section 104(e) pattern of  
15 violations, should be limited to cases where the mine operator  
16 repeatedly ignored the law. The 1977 Senate report states,  
17 and I quote:

18 "The Committee's intention is to provide  
19 an effective enforcement tool to protect  
20 miners where the operator demonstrates his  
21 disregard for the health and safety of  
22 miners through an established pattern of  
23 violations."

24 Senator Schweiker, the principal author of  
25 Section 104(e) made the following statements during the 1977

1 Senate debate:

2 "Mr. President, this amendment originated  
3 for two reasons.

4 First, we had a series of hearings on  
5 Scotia, Kentucky, where we lost people  
6 because there were repeated violations of  
7 known safety rules, and there was a  
8 concentrated effort not to comply with the  
9 law in case after case. We lost a lot of  
10 men because someone decided that they could  
11 ignore the law.

12 Second, we asked for computer printouts  
13 of the companies that had been assessed  
14 certain fines . . . [G]etting those  
15 computer printouts of the violations that  
16 have occurred end on end alerted me to the  
17 fact that we are not trying to police the  
18 good guys, because there are a lot of good  
19 guys who have complied with the law, who  
20 met those standards of the law and were  
21 in good faith trying to fulfill the law.  
22 But there were also a few who repeatedly  
23 thumbed their noses at the law, and that is  
24 exactly what we were trying to address here.

25 In fact, the bad guys, in essence,

1                   bring it about for the good guys, and I say  
2                   it is time we get the bad guys and not keep  
3                   hitting the good guys. That is really the  
4                   intent of it, and that is what it should do,  
5                   and hopefully that is what the standard  
6                   will say when we get it established."

7                   A similar point was made during the 1977 House  
8                   debate by Representative Perkins:

9                   "Repeated violations of the same degree  
10                  of potential hazard could result in the  
11                  closure of the mine. This provision is  
12                  directed to the Scotia-type operator. It  
13                  is intended to give unquestioned authority  
14                  to the inspector to deal with the reckless  
15                  operator who operated his mine without  
16                  regard for the safety or health of his  
17                  miners."

18                  It is clear from these statements that Congress  
19                  intended for MSHA to use its Section 104(e) authority only  
20                  against those few recalcitrant mine operators who repeatedly  
21                  ignored the law. The pattern of violations standard must  
22                  include safeguards to ensure that it is appropriately limited,  
23                  as intended by Congress. We believe MSHA's proposal fails in  
24                  this regard.

25                  Our proposed modifications to the Purpose and

1 Scope incorporates Congress' intent that the pattern provision  
2 be limited in scope to those few recalcitrant mine operators  
3 that are not responding to other enforcement tools already  
4 available to MSHA.

5 Our proposed alternative reads as follows:

6 "This part prescribes the criteria and  
7 procedures used by MSHA to determine whether  
8 a pattern of significant and substantial  
9 violations of mandatory safety and health  
10 standards exist at a mine or a portion of  
11 a mine for purposes of Section 104(e) of  
12 the Federal Mine Safety and Health Act of  
13 1977. It addresses mines where  
14 recalcitrant operators habitually allow  
15 the recurrence of violations of mandatory  
16 safety and health standards which  
17 significantly and substantially  
18 contribute to the cause and effect of  
19 mine safety and health hazards. The  
20 pattern of violations enforcement tool  
21 is intended to be applied only to the  
22 recalcitrant mine operators who are  
23 chronic violators of the law, and who  
24 have not responded to the use of the  
25 other enforcement tools available to

1 MSHA under the Act."

2 Ron will now provide some additional comments.

3 MR. WOOTEN: Mr. Chairman, we further believe  
4 that the pattern of violations standard must provide criteria  
5 for identifying significant and substantial, S & S,  
6 violations.

7 It is a fundamental principle of due process  
8 that operators must have reasonable notice of conduct for  
9 which sanctions can be imposed, and objective protection  
10 against arbitrary enforcement. The courts have applied this  
11 rule in the occupational safety and health context. In  
12 Diebold, Inc. v. Marshall, the Sixth Circuit Court of Appeals  
13 stated:

14 "Among the myriad applications of the  
15 due process clause is the fundamental  
16 principle that statutes and regulations  
17 which purport to govern conduct must  
18 give an adequate warning of what they  
19 command or forbid . . . Even a regulation  
20 which governs purely economic or  
21 commercial activities, if its violation  
22 can engender penalties, must be so  
23 framed as to provide a constitutionally  
24 adequate warning to those whose  
25 activities are governed."

1                   MSHA's proposal runs afoul of this fundamental  
2 principle by failing to provide criteria that inspectors must  
3 apply to determine whether a violation is significant and  
4 substantial. In failing to provide clear identification of  
5 violations that can lead to closure, MSHA's proposal  
6 eliminates a primary Congressional safeguard against abuse of  
7 Section 104(e) authority. Congress was extremely concerned  
8 that Section 104(e) might allow issuance of withdrawal orders  
9 solely at the whim of an MSHA inspector. Senator McClure  
10 expressed this fear during the 1977 Senate debate:

11                  "What this provision really means is  
12                  that the Secretary's representative or  
13                  an inspector can make an ex parte  
14                  decision as to what constitutes a  
15                  'pattern' of violations in a mine.  
16                  The way to deal with enforcement is  
17                  not to throw out the book on due  
18                  process and fairness . . ."

19                  MSHA cannot provide the protection against  
20 arbitrary enforcement without providing specific criteria that  
21 inspectors must use to identify S & S violations. The key  
22 decisions that need to be incorporated into the rule making  
23 are: MSHA v. Cement Division, National Gypsum Co., MSHA  
24 v. Union Oil Company of California, MSHA v. Mathies Coal  
25 Co., and Consolidation Coal Company v. The Federal Mine

1       Safety and Health Review Commission.

2                   Our proposed definition incorporates the  
3 concept of these cases to allow the proper S & S designations  
4 for both safety and health violations.

5                   The citation form must be modified to comply  
6 with the Review Commission decisions regarding S & S  
7 findings. The S & S checkbox on the citation form should be  
8 deleted and the form modified to require narrative responses  
9 that would promote a thorough analysis of S & S findings by an  
10 inspector.

11                  MSHA's recent Program Policy Letter is a step  
12 in the right direction. However, this definition must be  
13 incorporated into the standards in order to provide operators  
14 with adequate notice of prohibited conduct and to protect the  
15 operators from arbitrary enforcement.

16                  The criteria for establishing patterns  
17 correctly includes "unwarrantable failure" violations.  
18 However, MSHA must incorporate the definition of  
19 "unwarrantable failure", adopted by the Review Commission.  
20 Our proposed definition is derived from Emery Mining Corp.

21       v. MSHA.

22                  We recommend adding Section 104.2 to  
23 accommodate our recommended definitions, which are included in  
24 our written comments on Page 2, with additional rationale on  
25 Pages 3 and 7.

1                   I'll turn it back to Mr. Barnes for further  
2 comments.

3                   MR. BARNES: Well, the next comments I would  
4 like to make are relative to screening for a pattern.

5                   We believe that pattern screening should be  
6 done at the national level. The severe consequences that can  
7 result from this review demands that the initial screening be  
8 made by the Administrator. The Administrator has access to  
9 all the enforcement information, and is in a position to  
10 request and receive any additional information he would need  
11 to complete his analysis. Further, the Administrator is  
12 removed from the initial enforcement actions; therefore, he or  
13 she would be in a position to independently evaluate all of  
14 the information.

15                  The initial screening process should be focused  
16 on S & S violations that are associated with more than an  
17 ordinary degree of negligence.

18                  Congress recognized the need to limit 104(e)  
19 enforcement to those few, if any, mine operators whose  
20 recalcitrance results in repeated S & S violations. MSHA must  
21 recognize that at large mining operations, it's impossible to  
22 avoid repeated S & S violations, given MSHA's vigorous  
23 enforcement practices coupled with the continuing  
24 liberalization of the term "significant and substantial".

25                  Therefore, we have recommended a viable method

1 for MSHA to conduct the initial screening and identify  
2 potential pattern candidates for further review in Section  
3 104.4, pattern criteria. A review and analysis, as  
4 recommended, would identify those mines with serious  
5 compliance problems warranting further review.

6 Our alternative method is included in the  
7 written comments we have provided you. We would be happy to  
8 answer any questions the panel may have concerning our  
9 alternative at this time, or in the future.

10 Our recommended Paragraph (b) is a viable  
11 method for MSHA to conduct the initial screening, and it will  
12 enable the Agency to evaluate the thousands of S & S  
13 violations that can be expected in FY 1990, and identify,  
14 through that evaluation, potential pattern candidates for  
15 further review in Section 104.4, pattern criteria.

16 The majority of citations and orders are often  
17 accepted by operators on the basis of a business decision that  
18 weighs the cost of a legal appeal, against the payment of a  
19 fine. Unless the initial screening process is focused on  
20 S & S violations that are associated with more than an  
21 ordinary degree of negligence, then additional litigation  
22 involving S & S citations can be expected. A recommended  
23 addition of the phrase "mine identification number of the  
24 operator, or independent contractor" we believe is necessary  
25 to define the scope of the review. The review should be

1 focused on each individual identification number as a separate  
2 entity. Mine operator and independent contractor enforcement  
3 activities are separate. Therefore, all review procedures  
4 leading to a pattern notice must be separated. Neither a mine  
5 operator nor independent contractor should be a candidate for  
6 a pattern notice based on the recalcitrance of the other.

7 Section 104(e) of the Act provides MSHA with  
8 its strongest enforcement tool. Once placed on a pattern, a  
9 mine can expect a succession of closure orders that will  
10 render routine operations impossible. As a result of this  
11 effect, Congress repeatedly indicated its intent to apply the  
12 pattern provision to those few recalcitrant operators who have  
13 not responded to other enforcement tools.

14 To conform with this Congressional intent, MSHA  
15 must recognize that repeated significant and substantial  
16 violations alone are simply not enough to place a mine on a  
17 pattern. Many of the S & S violations cited are not the  
18 result of operator actions. The courts have repeatedly held  
19 the Mine Act to be a strict liability statute, and S & S  
20 citations are routinely issued in "no" negligence and "low"  
21 negligence situations.

22 Our recommended paragraphs in our written  
23 material provided to you, 104.3(c)(1) through (3), lists the  
24 compliance records that we believe the Administrator should  
25 review annually. A review and analysis of these three

1 categories would identify those mines with serious compliance  
2 problems warranting further review. This procedure would  
3 indicate the extent to which all other enforcement tools have  
4 been used at a specific mine, and if the use of these  
5 enforcement tools has significantly increased during the  
6 current year compared to the preceding year.

7 Congress recognized the intensity of MSHA's  
8 enforcement activities, and intended the pattern violator to  
9 be a mine operator whose recalcitrance results in repeated  
10 significant and substantial violations. From the perspective  
11 of the Mine Act enforcement, recalcitrance is demonstrated by  
12 the use of several enforcement tools: One, a 104(b) closure  
13 order issued for failure to abate; two, reckless disregard of  
14 the law or willful, intentional conduct which results in a  
15 104(a) citation, or 104(d) citation or closure order; and,  
16 three, a 107 imminent danger closure order associated with  
17 violations caused by willful misconduct or reckless disregard  
18 for the law. For MSHA to apply the pattern sanction in such a  
19 manner as to capture only those few operators who thumb their  
20 nose at the law, only S & S violations that result from  
21 recalcitrant acts of the mine operator should be used as an  
22 initial screening device.

23 Our recommended addition of Paragraph 104.3(e)  
24 will give the Administrator guidance in evaluating the results  
25 of initial screening and will promote consistency in the use

1 of the pattern provision.

2 Our recommended Paragraph 104.3(e) reads as  
3 follows; this is on Page 8 of the written material that we  
4 provided to you:

5 "If the Administrator's examination of  
6 initial screening criteria (a) through  
7 (d) reveals the repeated presence of  
8 each Section (c) factors and demonstrates  
9 a pervasive and continuing or increasing  
10 compliance problem, then the  
11 Administrator shall institute a further  
12 review pursuant to Section 104.4."

13 This provision requires that an operator  
14 evidence potential recalcitrance according to each listed  
15 factor, prior to the application of pattern criteria under  
16 104.4. MSHA's proposal does not include necessary findings.  
17 To meet the statutory intent, all of the criteria should be  
18 met so that recalcitrance is demonstrated. Failure to adopt  
19 our proposal would be arbitrary and capricious, contrary to  
20 the statute, and would result in a denial of due process.

21 Ron?

22 MR. WOOTEN: Further, Mr. Chairman, it is the  
23 industry's position that pattern criteria should differentiate  
24 between potential recalcitrant operators and concerned  
25 operators that may be experiencing a temporary compliance

1 problem.

2                   Issuance of a potential pattern of violations  
3 notice to a mine operator already responding and cooperating  
4 with MSHA to correct a problem at the mine would be  
5 disruptive, counterproductive, and contrary to the legislative  
6 intent. If S & S violations are merely counted and viewed in  
7 a vacuum, this unfair and unfortunate scenario could result to  
8 the detriment of the health and safety of the miners. With  
9 our suggested changes, the pattern criteria could be used to  
10 evaluate successfully the mines identified through initial  
11 screening to determine the few mines, if any, that may be  
12 recalcitrant due to their lack of response to other  
13 enforcement tools already available.

14                  An analysis of our four recommended criteria  
15 (Paragraphs 104.4(a)(1) through (4) on Page 11 of our written  
16 comments) would provide the proper tools to identify a  
17 potential recalcitrant operator. The recommended changes to  
18 the pattern criteria would separate the concerned operators  
19 that may be experiencing a temporary compliance problem from  
20 the few, if any, recalcitrant operators.

21                  A well-documented and specific affirmative  
22 finding by the Administrator is essential. Such a document  
23 would give the mine operator notice of the specific  
24 shortcomings identified by MSHA, so that these areas can be  
25 addressed. Further, the findings by the Administrator may

1 provide guidance that is necessary to institute a program to  
2 avoid repeated S & S violations and improve health and safety.

3 Harold?

4 MR. BARNES: Mr. Chairman and panel, we believe  
5 that only final citations and orders issued after the  
6 effective date of these regulations should be used for a  
7 pattern of violations review.

8 Prospective application is a consistent element  
9 of all MSHA regulatory changes. Fairness and due process  
10 demand that regulations that govern conduct must give an  
11 adequate warning of what they command or what they forbid.  
12 Once a final rule is published, then, and only then, will the  
13 operators and the miners have proper notice of conduct for  
14 which sanctions can be imposed. There is no compelling reason  
15 to break with precedent and apply this standard retroactively.

16 MSHA's proposed retrospective application of  
17 the regulations is contrary to the Mine Act and inconsistent  
18 with the principles of fairness contained in the due process  
19 clause of the Fifth Amendment. It is a long-established  
20 principle that the retroactive application of statutes is  
21 disfavored and will not be sustained unless clearly  
22 contemplated by Congress. In Union Pacific Railroad v.  
23 Laramie Stock Yards Company, the court stated:

24 "The rule has been expressed in varying  
25 degrees of strength, but always of one

1 import, that a retroactive operations will  
2 not be given to a statute that interferes  
3 with antecedent rights, or by which human  
4 action is regulaated, unless such be the  
5 unequivocal and inflexible import of the  
6 terms and the manifest intention of the  
7 legislature."

8 It is also very clear, in our opinion, that the  
9 same principles applicable to analyzing the retroactivity of  
10 statutes are applicable to administrative regulations. In  
11 Green v. United States, (1964); Springdale Convalescent  
12 Center v. Mathews in 1977 in the Fifth Circuit Court.

13 We submit that neither the text nor the  
14 legislative history of Section 104(e) provides support for  
15 such retroactive application.

16 MSHA's proposal to apply the pattern of  
17 violations regulations retroactively is fundamentally unfair  
18 to the mine operators and thus violates the due process clause  
19 of the Fifth Amendment. The mine operators will not have  
20 proper notice of prohibited activity until the final  
21 regulations and criteria are published. The mine operators  
22 may have decided to challenge more of the citations that they  
23 believed were improperly issued, if they knew that these  
24 violations would be applicable to the pattern of violations  
25 standard. This would, therefore, deprive the operators of

1       their opportunity to exercise the review procedures provided  
2       by the Act. Ultimately, retroactive application of this  
3       standard will penalize companies for violations that were  
4       improperly issued, which would be fundamentally unfair and in  
5       violation of due process.

6                  Only final citations within 24 months prior to  
7       the initial screening should be used in a pattern standard.

8                  It is necessary to clearly define the period of  
9       review. A review of more than two years would not accurately  
10      identify a potential pattern of violations candidate, or a  
11      current problem that should be reviewed by MSHA. Mine  
12      conditions can change substantially in a period of more than  
13      two years. Further, MSHA's policies and enforcement emphasis  
14      could change dramatically, as they have in the past.

15                 The procedures leading to the issuance of a  
16       notice, Paragraph 104.6(b) of our written comments, should  
17       provide all parties with an opportunity for review and  
18       comment.

19                 As a matter of fairness, all relevant  
20       information should be available to the Administrator before  
21       he begins to make his decision.

22                 The Assistant Secretary of Labor should make  
23       the final determination as to whether a mine should be placed  
24       on a pattern of violation cycle.

25                 Legislative history indicates that the final

1 decision should be made by the Secretary of Labor. We  
2 recognize that this may be impractical, therefore we recommend  
3 that the Assistant Secretary of Labor, for MSHA, should be  
4 delegated this decision. The significance of this  
5 determination, the most severe method of enforcement, mandates  
6 that the decision rest with the Assistant Secretary, the  
7 highest ranking official of the Agency.

8 An opportunity for a conference with the  
9 Assistant Secretary, before the decision becomes final, must  
10 be made available to afford all interested parties the  
11 opportunity to arrive at a solution before the issuance of a  
12 pattern of violations notice.

13 Congress' intent, and we believe it's MSHA's  
14 intent, is that the pattern of violations standard be remedial  
15 and corrective, not punitive. This recommendation would  
16 comport with these goals by allowing all parties to arrive at  
17 a solution and restore health and safety at the mine. If an  
18 operator continues to thumb their nose at the law, then the  
19 appropriate remedial solution would clearly be an issuance of  
20 a pattern of violations notice.

21 Ron?

22 MR. WOOTEN: Finally, Mr. Chairman, the  
23 termination of notice should allow MSHA and the operator to  
24 focus their efforts on a particular part of the mine, or the  
25 hazard that resulted in the issuance of the notice. This

1 will encourage and allow operators to address and correct  
2 the problems leading to the pattern notice.

3 All other areas of the mine shall continue to  
4 receive the same level of attention. However, increased  
5 efforts can be focused on the problems identified by MSHA.  
6 This will benefit health and safety by allowing MSHA and the  
7 operator to focus on the real health and safety hazards at the  
8 mine. The mine operators and MSHA do not have unlimited  
9 resources. Therefore, these resources should have some  
10 direction. The ultimate goal of Section 104(e) is to  
11 restore health and safety, not to punish the mine operator.  
12 Our recommended modification to this section will allow MSHA  
13 and the operator to focus their increased efforts on the  
14 problems leading to the pattern, and provide a reasonable  
15 mechanism to terminate the pattern once the underlying problem  
16 is corrected.

17 At this time, we feel it is incumbent for us to  
18 respond to some of the issues raised by other commenters to  
19 this proposal.

20 First, we agree with MSHA that only final  
21 citations and orders should be used to identify mines with a  
22 potential pattern of violations pursuant to Section 104(e) of  
23 the Act. The inspectors' statements reflect only their  
24 opinions, and do not prove the occurrence of a violation.  
25 Considering these statements, prior to the time that the

1 citations and orders become final would be inconsistent with  
2 the statute and would deprive the operators of the benefits of  
3 the review procedures provided by the Act. We firmly believe  
4 that MSHA's proposal to consider only final citations is  
5 fundamentally fair and is necessary to protect the mine  
6 operators from being penalized for citations that are  
7 ultimately proven to be invalid.

8                 The Senate Committee made a fairly extensive  
9 comparison of the unwarrantable and the pattern provision.  
10 However, the Committee's discussion of parallel or  
11 simultaneous use of these enforcement tools was focused upon  
12 enforcement subsequent to a 104(e) pattern notice and 104(d)  
13 unwarrantable failure order. Only after a pattern notice is  
14 issued do these enforcement tools parallel.

15                 There is absolutely nothing in the legislative  
16 history to support the commenter's position that the citations  
17 and orders used to identify mines with a potential pattern of  
18 violations should not be limited to final citations. Once  
19 again, we agree with MSHA that only final citations and orders  
20 should be applicable to the pattern of violations standards.

21                 Mr. Chairman, and members of the panel, we have  
22 put a great deal of effort into our response to this proposal,  
23 and we hope that our comments will be of assistance to you in  
24 this rule making. The objective theme or goal of our comments  
25 is to ensure balance and fairness in the application of the

1 pattern of violations standards. We recognize and appreciate  
2 the efforts of the panel that developed MSHA's proposal. As  
3 always, we look forward to working cooperatively with MSHA so  
4 that we may achieve our common goal of protecting the health  
5 and safety of the nation's miners.

6 That concludes our presentation on behalf of  
7 the American Mining Congress, the Bituminous Coal Operators'  
8 Association, Inc., and the National Coal Association. We  
9 thank you for this opportunity to testify.

10 MR. ZEUTENHORST: Thank you, gentlemen.

11 You mentioned, on at least two occasions, that  
12 you believe that the proposal, as it now stands, runs afoul to  
13 the principle of due process.

14 The first instance you mentioned it was the  
15 lack of a definition of S & S violation in the rule. As you  
16 know, MSHA has never placed a mine on a pattern of violations;  
17 therefore, there's no litigation, no court history, no case  
18 history behind whether that is, indeed, a fundamental  
19 infirmaty of the rule.

20 What I would ask you, though, if indeed it is  
21 necessary to define S & S in the rule for the purpose of due  
22 process? Are you aware of any case history for the 104(d)  
23 unwarrantable, which also relies upon a finding of significant  
24 and substantial?

25 MR. WOOTEN: Let me try to understand the

1 question. Are we aware of any case history that --

2 MR. ZEUTENHORST: It seems to me that an  
3 important point you're trying to make is that S & S needs to  
4 be defined in pattern of violations. Otherwise, the operator  
5 will not have due process. He will not know what an S & S  
6 violation is.

7 If that is, indeed, an infirmity, would not  
8 that be an infirmity under any citations and orders that were  
9 written under (d)(1), which also relies upon a finding of a  
10 significant and substantial violation?

11 MR. WOOTEN: I see your point. Let me make a  
12 comment, first. Not only on the S & S issue, but also on the  
13 unwarrantable.

14 We feel that both the unwarrantable failure and  
15 a significant and substantial definitions need to be included.  
16 Perhaps the unwarrantable failure definition, and certainly  
17 the industry has requested that an unwarrantable failure  
18 definition be included in numerous other rule makings.

19 As the two definitions, or lack thereof,  
20 continue to be revised through the courts, they represent a  
21 moving target for the operator, if you will. One day the  
22 definition may be changed by the courts, and all of a sudden  
23 we have a separate test. That's why we are very adamant in  
24 our position that both the definition of significant and  
25 substantial, as it exists today, and a definition of

1 unwarrantable failure, as it exists today, needs to be  
2 included in these regulations to eliminate this moving target.

3 In response to your questions on case  
4 history, I don't know of any off the top of my head. Perhaps  
5 Harold does, but we will be happy to research it and respond  
6 in writing at a later point.

7 MR. ZEUTENHORST: Okay.

8 What you suggested for definition of S & S  
9 is, indeed, based upon the National Gypsum. That was a  
10 Review Commission case, and we've heard testimony this  
11 morning that certain terms need to be further defined.

12 Do you believe that in defining them in the  
13 rule for pattern of violations, which is specific to a  
14 finding of pattern of violations, will fix the target, or  
15 will the courts still have an opportunity -- I mean, I'm not  
16 certain that placing the definition in a rule that is  
17 specific to pattern of violations will fix the target?  
18 Inasmuch as we're targeting a few mines, the issue of S & S  
19 violations has much more implication to a greater number of  
20 mines outside of the pattern context, so that that definition  
21 would not be controlling, I believe, over what the Agency  
22 does for S & S violations only in such instances as we then  
23 place a mine on an actual pattern.

24 I'm trying to explain a little bit of the  
25 reluctance of the Agency to sort of fix in time something that

1       is evolving; that is subject to further interpretation. We've  
2       done this by policy memo. We're attempting to come up with a  
3       more uniform application.

4                    MR. WOOTEN: I understand your point. However,  
5       I would reiterate once again that we feel very strongly that  
6       an S & S definition, whether it's in the pattern of violations  
7       regulations, recognizing that they're going to be used in very  
8       few instances, nevertheless, the regulatory perfection, if you  
9       will, of that definition is very important to us in some  
10      regulation, somewhere.

11                  MR. ZEUTENHORST: Okay.

12                  I'd like to ask a couple questions on the  
13       initial screening criteria that you referenced this morning.  
14       This is, in your draft, 104.3, Paragraph (b). In that, you  
15       use the term "willful misconduct".

16                  Could you direct us to someplace in the  
17       legislative history of the statute. Is that coming out of the  
18       legislative history of the statute, or is that coming out of  
19       your interpretation of the Congressional intent?

20                  MR. WOOTEN: I would hesitate to speak for the  
21       entire industry, but I will. It seems, by my recollection,  
22       that that is, in fact, our interpretation of what reflects  
23       recalcitrance. And we would find anyone hard pressed to  
24       disagree with that particular assessment or definition.  
25       Harold, you may want to elaborate further on that. And we can

1 certainly, if I'm off base on this, straighten it up with some  
2 written comments at a later date.

3 MR. ZEUTENHORST: Okay.

4 Earlier this morning, we heard testimony that  
5 107(a) and the danger closure order should have no place in  
6 any pattern determination.

7 Under your Paragraph (c), and further reference  
8 under Paragraph (e); that's Section 104.3 -- under (e), it  
9 says, "If the Administrator's examination of the initial  
10 screening criteria (a) through (d) reveals that the repeated  
11 presence of each Section (e) factors" -- that's where I want to  
12 horn in on the Section (e) factors.

13 In other words, in the initial screening,  
14 Section (c), includes a fact of repeated Section 107(a),  
15 "imminent danger closure orders issued in conjunction with the  
16 enforcement actions described above".

17 That seems to be telling me that the industry's  
18 recommending, in this instance, that 107 should be a necessary  
19 precursor to a proceeding to identify a mine on a pattern;  
20 that each of those has to be there, and it very clearly says  
21 "and" after each of these; a pattern mine is going to have  
22 107's, is that correct?

23 MR. WOOTEN: Two points on that. The cogent  
24 language there, if you will, is issued in conjunction with  
25 enforcement actions described in 1 or 2, above. And we're

1 talking about not only the existence of an imminent danger,  
2 but the existence of an imminent danger with an underlying  
3 104(a) S & S violation with findings of reckless disregard, or  
4 intentional, or willful conduct.

5 MR. ZEUTENHORST: But let's take the first two  
6 criteria. Let's say you have an operator who has repeated  
7 104(a) or (d) S & S violations with reckless disregard, for  
8 the sake of argument. And, also, you have 104(b) closure  
9 orders, but without any 107(a) imminent dangers. That would,  
10 effectively, under your recommendation preclude MSHA from  
11 further assessment of that operator of having a pattern of  
12 violations. Is that a fair assessment?

13 MR. WOOTEN: I see your point. I'll let Harold  
14 answer that one.

15 MR. BARNES: I think we would need to get back  
16 to you on that.

17 MR. ZEUTENHORST: Okay. Very good.

18 MR. BARNES: I see the point that you're  
19 making.

20 MR. ZEUTENHORST: I've got another question on  
21 the pattern criteria, 104.4; that would be Paragraph (a)(4).  
22 It's the fourth criteria, "an affirmative action upon the  
23 finding would be required".

24 You would require a history repeated S & S  
25 violations of mandatory health and safety standards caused by

1 unwarrantable failure to comply with the current unwarrantable  
2 failure cycle in effect at the mine. So, you would make the  
3 104(d), unwarrantable failure, as a definite precursor to  
4 being on a pattern, is that correct?

5 MR. WOOTEN: That's correct.

6 MR. ZEUTENHORST: Okay.

7 One of the things the Agency has been dealing  
8 with, or attempting to deal with, is the legislative history  
9 and you have obviously been through as much as we have. It,  
10 at one point, says that both the 104(d) and the 104(e)  
11 enforcement tools should be available to the inspector.

12 Do you see any sort of contradiction here, or  
13 how would you rationalize this?

14 MR. WOOTEN: Well, I'll speak first and then  
15 let Harold speak.

16 I don't see any inconsistency. Once you're on  
17 the cycle, regardless when you find another similar violation,  
18 the statute requires the issuance of another (d) order --  
19 (d) (2) order.

20 That does not preclude, however, once you are  
21 on the cycle, the issuance of an (a) notice, or an (a) order,  
22 whatever.

23 MR. ZEUTENHORST: In effect, though, this again  
24 would be a mine that -- and this is very hypothetical. I  
25 would tend to agree that if a mine is a pattern violator that

1 you would probably find evidence in the unwarrantable failure  
2 citations, as at Scotia. But it would, hypothetically,  
3 preclude a mine from being placed on a pattern, unless it had  
4 first been on a 104(d) sequence, right?

5 MR. WOOTEN: (Whereupon, Mr. Wooten nods his  
6 head to the affirmative.)

7 MR. ZEUTENHORST: Okay.

8 One final question that I have goes with the  
9 termination of notice.

10 You've stated, and I'll quote 104.7,  
11 "Termination of Notice", Paragraph (a), "Termination of a  
12 Section 104(e)(1) pattern of violations notice shall occur  
13 when an inspection by MSHA results in no significant and  
14 substantial violations of mandatory health and safety  
15 standards issued (1) at the mine, or (2) the portion of the  
16 mine involved in the pattern, or (3) for the hazard involved  
17 that resulted in the pattern, or (4) 90 days after the  
18 issuance of the pattern if no S & S violations are issued in  
19 any of the three categories described herein.

20 The Agency has found the portion of the statute  
21 which talks about no S & S violations in an inspection of the  
22 entire mine to be one of the clearest parts of the  
23 Congressional intent.

24 Could you tell me how this would comport with a  
25 clear reading of the statutory language that it has to be in

1 the entire mine? Under yours, we could go in and find if  
2 there was a pattern of violations of ventilation standards,  
3 then we could go in and find a clean inspection for the S & S  
4 ventilation citations. However, there could be roof control  
5 S & S, and so on and so forth. Is there an inherent  
6 contradiction between a proposal such as this and an  
7 inspection of the entire mine?

8 MR. WOOTEN: Well, I think there is a  
9 contradiction, to a certain extent at least by the way you're  
10 reading it. We don't exactly read it that way. We feel that  
11 a pattern notice and/or a pattern notice or order could be  
12 issued, based on a hazard based on one particular standard, or  
13 based on one particular area of the mine.

14 MR. ZEUTENHORST: Agreed on that part, yes.

15 MR. WOOTEN: Okay. Now, if we don't see the  
16 necessity -- it doesn't make sense, and we don't believe that  
17 Congress intended that the mine has to be absolutely purged of  
18 all S & S violations before you come off the pattern.  
19 Especially, if the pattern resulted from the issuance of, for  
20 instance, ventilation violations, or the pattern resulted from  
21 conditions or unsafe practices, or recalcitrant type  
22 operations in a segment of the mine, why the rest of the  
23 mine should have to be clean, if you will, of S & S.

24 We've heard testimony today, and I suspect  
25 we'll hear it again, that it's going to be virtually

1 impossible to go through a large coal mine in this country, or  
2 metal/non-metal mine in this country, at any time, day or  
3 night, and not find an S & S violation.

4 So, if that's the standard, then I suspect that  
5 that mine will be on a pattern ad infinitum.

6 MR. ZEUTENHORST: How likely do you think it is  
7 that the true pattern violator, the recalcitrant operator is  
8 the term you used and I believe the legislative history uses  
9 recalcitrant numerous times -- how likely do you think it  
10 would be that that operator would have a pattern. I mean,  
11 obviously, the Agency could use ventilation standards as  
12 establishing the pattern, but it would seem to me, through the  
13 legislative history, that there's a pervasive management  
14 problem that would carry over into other areas. And merely  
15 correcting that one area, would that, in your opinion, show  
16 that the operator has turned over a new leaf, as it goes?

17 We're dealing with a very clear -- 104(e)(3)  
18 says, "If upon an inspection of the entire mine the authorized  
19 representative finds no violation", it's a very difficult  
20 reading to sort of get what you've come on here. The way the  
21 Agency has dealt with this is we've set as our goal in pattern  
22 that before that mine actually is placed on pattern is to do  
23 all we can to get the health and safety conditions at that  
24 mine improved. Failing that, we find our hands pretty much  
25 tied, and failing that the operator has probably demonstrated

1 no desire to change the management style of the mine.

2 I'm just talking on here, but that's to give  
3 you a little bit of the idea --

4 MR. WOOTEN: Right.

5 MR. ZEUTENHORST: -- of the thoughts behind the  
6 Agency's position.

7 Any questions?

8 Okay. Thank you, gentlemen.

9 MR. WOOTEN: Thank you.

10 MR. ZEUTENHORST: Our next speakers this  
11 afternoon is Mr. John Reeves from Mid-Continent Resources.

12 MR. JOHN REEVES: Mr. Chairman, we thank you  
13 for the opportunity of letting us have the privilege of giving  
14 you our comments. My name is John Reeves. I am President of  
15 Mid-Continent Resources, and I appreciate this opportunity to  
16 comment on the proposed pattern of violation regulations, and  
17 Section 104(e) of the Federal Mine Safety and Health Act of  
18 1977.

19 We, generally, concur with the American Mining  
20 Congress recommendations, and with the Colorado Mining  
21 Association recommendations concerning the pattern of  
22 violations.

23 Mid-Continent Resources operates the Dutch  
24 Creek Mine in Coal Basin, Pitkin County, Colorado. We are a  
25 small operation. We operate only advancing longwalls at our

1 mine, and in fact it's the only advancing longwall in the  
2 United States. It's our intention to go to all advanced  
3 mining at our property. We do this primarily for reasons of  
4 safety, because under heavy cover advanced mining is the  
5 safest method of mining coal known in the world today.

6                 The Dutch Creek Mine has some of the most  
7 difficult mining conditions in underground coal mines in the  
8 United States. We operate two seams; these two seams are 500  
9 feet apart. The outcrop of the coal seams is at an elevation  
10 of approximately 10,000 feet above sea level. The deeper seam  
11 has approximately 3,000 feet of overburden, or cover. The  
12 coal seams are steeply pitching, approximately at about 13  
13 degrees. Because of the depth of the coal seams, they are  
14 gassy and prone to outbursts and mountain bumps. The coal is  
15 very soft and pliable; has an index of about 115.

16                 Other mines, perhaps, have more extremes of  
17 these conditions. Collectively, however, we believe we have  
18 certainly among the most difficult mining conditions in any  
19 underground coal mine in the United States. In fact, we are  
20 the only gas outbursting coal mine that I know of in the free  
21 world which is producing coal on the competitive market.

22                 I served in the U. S. Navy during World War II,  
23 after completing an NROTC program at the University of  
24 Colorado. After World War II, I graduated from the University  
25 of Utah with a degree in mining engineering. I've been

1 involved in underground coal mining all of my adult life; have  
2 observed underground coal mining both in the United States and  
3 abroad for nearly five decades.

4 I believe the domestic coal industry is facing  
5 major changes. Much of the easy coal is disappearing. In the  
6 not-too-distant future, perhaps as early as the 21st Century,  
7 deep mines will be the norm of our domestic coal industry,  
8 just like in Europe. These mines will face most, if not all,  
9 of the problems encountered by Mid-Continent in the Dutch  
10 Creek Mine as they go under more cover. Unfortunately, I  
11 sense that a difficult mine is too readily regarded as a  
12 problem mine.

13 MSHA must also prepare for this change. In my  
14 judgment its focus should be on the change which must be the  
15 agenda if our domestic U. S. coal industry is to survive. The  
16 Agency norm, its present focus, in my judgment, is like war  
17 college curricula. The war college fights the last war.  
18 Enforcement focuses on the norms of the easy coal. Easy coal  
19 norms are not a fair measurement for difficult coal mining  
20 conditions.

21 In the past two years, beginning in September  
22 of 1987 and continuing until April of 1989, Mid-Continent was  
23 subjected to the most intense, protracted, microscopic  
24 inspection scrutiny of any coal operator of which I am aware  
25 in the United States. During this 18-month saturation

1 inspection, more than 2,000 citations and orders were issued.  
2 At the height of the saturation, there were 373 inspection  
3 days in a single calendar month. During this 18-month  
4 saturation period, more than 250 Section 104(d) citations and  
5 orders were issued. At one point, we were litigating more  
6 than 200 citations and orders. A complete waste of the  
7 resources of both the Federal Government and Mid-Continent.

8 The constant complaint Mid-Continent heard from  
9 MSHA was, "We never see you producing coal. When our  
10 inspectors go up to the mine, the sections are shut down. We  
11 are not comfortable with the way you do things". I don't find  
12 this convincing. Production in the calendar year 1988  
13 increased more than 20 percent over calendar year 1987.  
14 Further, the majority of the violations written were issued in  
15 outby areas, non-face areas. Finally, we found when working  
16 sections were shut down that much of this was due to a  
17 conscious effort by mining personnel to correct conditions  
18 under necessary situations, without the necessity of a  
19 citation or an order.

20 The consequence of this protracted saturation  
21 inspection was that MSHA assumed virtual control of  
22 Mid-Continent operations. It cost Mid-Continent people their  
23 jobs. Hourly and salary people were demoralized and many  
24 quit. It nearly put Mid-Continent out of business.

25 What resulted was that Mid-Continent had proof

1 that MSHA could put us out of business. We suspected that  
2 before this saturation inspection. MSHA learned, we believe,  
3 that Mid-Continent has some of the most difficult mining  
4 conditions and some of the best coal miners in the United  
5 States, and we do a pretty good job despite some mighty  
6 difficult mining conditions.

7 For example, we have recording methane monitors  
8 on every one of our operating sections, which record the  
9 percentage of methane in the lamphouse, so any interested  
10 person can come up and see what the percentage of methane is  
11 on the face and in the last open crosscut. These monitors  
12 kicked the power on the section, in its entirety, at 1  
13 percent.

14 In addition, we practice probably the best  
15 outburst control techniques anywhere in the United States. We  
16 have an elaborate and sophisticated outburst control program.

17 In spite of that, we still have an inspector at  
18 the mine each operating shift that anybody works at the mine.

19 To me, the long saturation inspection proved  
20 that MSHA, unquestionably, has the power to put us, or  
21 virtually any other coal operator, out of business. But a  
22 little operator makes a convenient target and a statistic to  
23 show just how vigorous an enforcement agency can be. I can  
24 think of no greater agency power than its ability to put a  
25 regulated company out of business. This power,

1 unquestionably, exists under the 104(d) of the 1977 Mine Act.

2                   With the 1977 Mine Act, Section 104(d) powers,  
3 a pattern of violations sanction is like strategic nuclear  
4 stockpiling. If there is an existing ability to annihilate  
5 someone, it really makes little sense to arm to the capacity  
6 to annihilate the same person twenty, or two, times over.  
7 Perhaps "overkill" has a legitimate place in global conflict.  
8 I fail to see its application in a regulatory scheme.

9                   I realize that the 1977 Mine Act contains a  
10 Congressional mandate for pattern of violations, and it cannot  
11 be ignored. However, the 1977 Mine Act, and its enforcement,  
12 as we have experienced, moot any need for pattern of  
13 violations. I submit to you that this fact should be known to  
14 Congress by the Agency, and the Agency should seek repeal of  
15 this section as legislative overkill. I believe the private  
16 sector would support this effort; certainly we would.

17                  Pattern of violations is like pornography.  
18 Everybody thinks they know what it is, but the proposed  
19 regulations fail to satisfactorily define it. The conceptual  
20 notions expressed in the present proposed regulations do not  
21 adequately define what conduct is to be proscribed.

22                  After reading the proposed pattern of violation  
23 regulations, I do not know what conduct will constitute a  
24 pattern of violations. I cannot tell my superintendents and  
25 foremen what a pattern of violation is. I see a number of

1 criteria which will be taken into consideration, but I see  
2 nothing in the proposed regulations which describes how those  
3 criteria will be applied, or what criteria actually  
4 constitutes a pattern.

5 To shift the matter to another perspective, I  
6 asked myself if I were an Administrative Law Judge, how would  
7 I know whether a certain conduct constituted a pattern. I  
8 found nothing in the proposed regulations which satisfactorily  
9 answered two essentials. First, an ascertainable definition  
10 or standard which was a pattern. And, second, any measurable  
11 mark by which a determination of a pattern could be tested as  
12 correct.

13 When Congress adopted the pattern of violations  
14 section of the 1977 Mine Act, it left MSHA to define what  
15 actually constitutes a proscribed pattern. In my judgment,  
16 MSHA has failed to do this. The proposed regulations provide  
17 more questions than answers and promise years of litigation  
18 and uncertainty.

19 The legislative history surrounding pattern of  
20 violations, Congress gave me the impression that there were  
21 only a few operators in the United States that should be  
22 subjected to a pattern sanction. We see nothing in the  
23 proposed regulation justification that suggests Congress'  
24 appraisal was in error.

25 The proposed regulations appear to multiply

1 this predication by a factor of nine. This suggests that the  
2 potential of a beauty contest in and among the nine MSHA  
3 districts. Unless there is some justification for district  
4 pattern determinations, unless MSHA has failed to improve the  
5 safety climate in the domestic coal industry, we believe the  
6 concern is small, national in character, and the determination  
7 should be by the Administrator.

8 Further, we believe there should be adequate  
9 procedural safeguards, such as notice to an operator of a  
10 potential pattern, an opportunity to formally present  
11 evidence, a requirement that evidence presented by an operator  
12 is considered, and that a requirement that the pattern  
13 determination be based upon all the evidence. A pattern  
14 determination is an adjudicatory process. The proposed  
15 regulations contain no adjudicatory safeguards.

16 In closing, we want to thank you for this  
17 opportunity, and I can assure you that we look forward to  
18 working cooperatively with MSHA.

19 MR. ZEUTENHORST: Thank you, Mr. Reeves.

20 I would just like to make one point about the  
21 MSHA proposal. It was the Agency's intent that when the  
22 District Manager would notify a mine, in writing, that they  
23 may be developing a potential pattern, that that notification  
24 would spell out, in detail, the basis for the Agency's  
25 determination that a pattern may, indeed, either be developing

1 or exist. And at that point, both the operator and miner's  
2 representative would be given a chance to look over these  
3 documents and to make a response to the District Manager.

4 MR. REEVES: Thank you.

5 My point is, though, that frequently -- say if  
6 you have a deep mine that outbursts, now pillars are what  
7 usually outburst in a coal mine, naturally. So, we have what  
8 we call a yielding pillar in our mine, because a yielding  
9 pillar does not accumulate energy, and therefore it does not  
10 outburst. A yielding pillar, by definition, must slough or  
11 yield its weight off. By the same token, though, a certain  
12 inspector can come up and cite you constantly for having coal  
13 sloughage on pillars. And in some cases we've actually made  
14 situations unsafe because we just kept loading out pillars,  
15 loading out pillars, to comply with the law, and yet you could  
16 say we had developed a pattern of violating the law because we  
17 kept having pillars which sloughed.

18 Well, I don't see how you can mine coal under  
19 3,000 feet of cover and not develop some patterns with a few  
20 problems, and rib sloughage is one of them.

21 MR. ZEUTENHORST: Thank you, Mr. Reeves.

22 MR. REEVES: Thank you.

23 MR. ZEUTENHORST: Our next speakers are  
24 representatives of the United Mine Workers of America. First  
25 we have Linda Raisovich-Parsons.

1 MS. LINDA RAISOVICH-PARSONS: Good afternoon.

2 My name is Linda Raisovich-Parsons, and I'm here today on  
3 behalf of the United Mine Workers of America.

4 Let me begin by stating that the UMWA is in  
5 total support of MSHA's long-overdue decision to issue  
6 regulations for implementing Section 104(e) of the Act.  
7 Congress recognized the need for strong enforcement measures  
8 after its investigation of the tragic Scotia disaster in 1976.  
9 Their investigation revealed that the Scotia Mine, as well as  
10 others, had a history of recurrent violations which the  
11 existing enforcement scheme was unable to adequately address.  
12 When enacting the 1977 Mine Act, Congress set forth a  
13 provision which authorized MSHA to impose stringent  
14 enforcement sanctions for those recalcitrant mine operators  
15 who thumb their nose at mine health and safety. The UMWA is  
16 glad to see this long-evaded enforcement tool finally put into  
17 effect.

18 An overview of the proposed rules reveals the  
19 proposal stops short of providing the effective enforcement  
20 tool which Congress wished. Many areas are too vague or  
21 contradict the expressed intent of Congress. The proposal  
22 provides many escape routes through which a mine operator can  
23 elude Section 104(e) enforcement. The UMWA does not feel  
24 these rules totally reflect the sanction which Congress  
25 foresaw.

1                   A prime example of this is included in Section  
2 104.3 of the proposal. This provision provides that only  
3 final citations and orders will be considered when identifying  
4 mines for the potential pattern of violations. If MSHA  
5 restricts itself to final citations and orders, operators will  
6 be strongly motivated to challenge every S & S citation they  
7 are issued, regardless of the merits of their position. Such  
8 legal challenges can drag on for years before all appeals are  
9 exhausted. Under this situation, MSHA will be trying to  
10 determine whether a pattern exists on the basis of conditions  
11 that were cited several years previously. This will subvert  
12 the whole intent of Section 104(e), which is to identify those  
13 mines with serious health and safety management problems, and  
14 promptly restore them to a safe workplace. If a pattern is  
15 finally determined to exist, the danger to miners will have  
16 been in existence for an unnecessarily long period of time  
17 before any action can be taken to correct the condition.

18                  Further, if MSHA limits itself to a certain  
19 time frame for considering the mine's history, it would be  
20 very easy for an operator to completely escape a liability  
21 under Section 104(e). It would certainly be easy enough for  
22 an operator to challenge all S & S citations and keep their  
23 validity in legal limbo until the time period for evaluation  
24 expires. Once that time period passes, the operator would  
25 safely drop its challenge. The operator would know that even

1 though the citation was now final, it would be too old to be  
2 included in the assessment for a pattern notice.

3 Requiring a Section 104(e) order to be based  
4 only on final citations and orders is completely contrary to  
5 the rest of the Act's enforcement scheme. A failure to abate  
6 order under Section 104(b), or an unwarrantable failure order  
7 under Section 104(d), are each issued on the basis of previous  
8 citations, whether or not those citations have been  
9 challenged.

10 Likewise, an operator who disputes an  
11 inspector's determination as to whether an imminent danger  
12 exists must comply with the Section 107 order, while he  
13 challenges its issuance.

14 There is absolutely nothing in the legislative  
15 history which supports such a different and restrictive  
16 approach to the application of Section 104(e). Indeed, the  
17 legislative history requires the opposite conclusion. In  
18 discussing the sequence for issuing a Section 104(e) order,  
19 the Senate Committee noted that the pattern order sequence  
20 parallels the current unwarrantable failure sequence of the  
21 Coal Act, and the unwarrantable failure sequence of Section  
22 105(c) of that Bill. If pattern orders can be based only on  
23 final citations, its enforcement cannot be said to parallel  
24 that of Section 104(d), as Congress intended.

25 The Senate Committee gave a fairly extensive

1 comparison between the unwarrantable and the pattern  
2 provisions. They explained that the violations which set into  
3 motion the unwarrantable failure sequence must be of a  
4 significant and substantial nature and must be the result of  
5 the operator's unwarrantable failure to comply. In  
6 comparison, they point out that there is no requirement that  
7 the violations establishing the pattern offense be a result of  
8 the operator's unwarranted failure; only that they be of a  
9 significant and substantial nature. The Committee further  
10 describes other ways in which the enforcement provisions  
11 parallel each other, including the 90-day period for issuance  
12 of either order, and the requirement of an intervening clean  
13 inspection before either order can be terminated.

14 The Committee concluded its discussion by  
15 pointing out that it was the Committee's intention that the  
16 Secretary, or his authorized representative, may have both  
17 enforcement tools available, and that they can be used  
18 simultaneously if the situation warrants. Under this proposed  
19 rule, Congress' intention would be completely thwarted. The  
20 Secretary could hardly use both enforcement tools  
21 simultaneously if an operator's challenge to the underlying  
22 citations effectively blocked implementation of one of those  
23 tools.

24 Another area of concern to the UMWA is the  
25 procedure set forth in Section 104.4 for the issuance of a

1 notice and review with the District Manager. Although we do  
2 not completely oppose the procedure established by this  
3 section, we feel that changes are necessary to provide a fair  
4 balance to the review process. This section establishes  
5 guidelines for review and conference with the District Manager  
6 when a pattern notice is issued. If such a procedure is  
7 established, to provide additional input regarding the  
8 information upon which the pattern notice is based, it should  
9 be done through written comments with copies provided to all  
10 parties. An opportunity for a conference, as proposed,  
11 discriminates against the miner's representative, unless the  
12 representative is protected against loss of pay.

13 Such a conference is currently provided by 30  
14 CFR, Section 100.6, for review of citations and orders.  
15 Although miner's representatives are afforded an opportunity  
16 to participate, they are usually unable to do so. This is  
17 because pay is not provided to the representatives for  
18 attending these conferences. Mine operators frequently  
19 exercise this privilege, and many local unions are not  
20 financially able to pay lost wages for representatives to  
21 attend these events so often. This normally leaves the  
22 conferences open to the operator's attempts to influence and  
23 pressure MSHA to vacate citations and orders.

24 To provide another conference procedure for  
25 review of a pattern of violations notice would result in the

1 same situation. Therefore, the UMWA recommends that any input  
2 be reduced to writing to provide a fair balance to the  
3 procedure, unless as a precondition to requesting a  
4 conference, the operator agrees to reimburse the miner's  
5 representative for any lost wages.

6 The Union further recommends that any mine  
7 identified as having been subject to a pattern notice in the  
8 past should not be afforded the opportunity for further input.  
9 These mines should be subject to an automatic pattern of  
10 violations notice if the criteria is met, because these  
11 operators have already exhibited a disregard for health and  
12 safety in the past. This should be sufficient grounds to  
13 implement 104(e) without further review.

14 Lastly, but most importantly, the Union has  
15 serious concerns regarding the provision which provides an  
16 operator the opportunity to implement a program to avoid  
17 repeated S & S violations. Although we do not wish to deny a  
18 final effort on the operator's part to restore his mine to a  
19 safe and healthful environment, the structure of this  
20 provision must be tightened up to avoid abuse.

21 The District Manager is given the authority,  
22 under this procedure, to determine if the program is effective  
23 in reducing the number of S & S citations issued at the mine  
24 in question. If he determines that it is not effective, the  
25 District Manager then submits a report to the Administrator

1 and would include the evaluation made under the proposed  
2 regulations. However, if the District Manager determines that  
3 a program is effective, no report is required. Furthermore,  
4 the rules do not provide any indication of how these programs  
5 will be determined to have effectively reduced the occurrence  
6 of S & S violations at the mine.

7                 The UMWA feels that there is a tremendous  
8 potential for abuse under this provision. The mine, which has  
9 been identified as having serious problems, could never come  
10 under the enforcement mechanism set out under Section 104(e)  
11 simply on the basis of the District Manager determining that a  
12 program has effectively reduced the occurrence of S & S  
13 violations. We feel it is more important to require the  
14 District Manager to detail how the program has been effective  
15 in reducing the number of S & S violations, and what he has  
16 determined an effective production to be. Then, all parties  
17 will have information as to how the District Manager arrived  
18 at his decision and be able to provide comments if they  
19 disagree.

20                 The procedure must also clarify several  
21 unanswered issues as to how it would be administered. First,  
22 it must specify that the length of the program cannot exceed  
23 90 days, and that the program can only be applied once during  
24 any pattern of violations notice. It must also provide  
25 consideration and insulate MSHA inspectors from external

1 pressure during the 90-day trial period to cite violations as  
2 non-S & S. It must specify that citations and orders issued  
3 during the 90-day trial period must not be final to be  
4 considered. If not, what would happen if, during this period,  
5 an operator continues to receive S & S citations, but decides  
6 to challenge virtually all of them? Will an MSHA District  
7 Manager not count them because they are not final, and  
8 declare there has been an effective reduction in citations?  
9 These are just a few examples of the abuses with the program  
10 the UMWA can foresee if clarifications are not provided.

11                  For this reason, we urge the Secretary to adopt  
12 the UMWA's recommendations provided in our written comments,  
13 and I appreciate this opportunity to testify and will answer  
14 any questions you may have now.

15                  MR. ZEUTENHORST: I've got one question for you  
16 on the conferencing.

17                  I think you've indicated that if a mine has  
18 been identified as having been subject to a pattern notice in  
19 the past, it should not be afforded an opportunity for further  
20 input in conferencing. What sort of situation are you  
21 envisioning there? The mine had been on a pattern of  
22 violations and gotten off, or --

23                  MS. RAISOVICH-PARSONS: If it has either been  
24 on a pattern, or it has exhibited a pattern of violations of  
25 the same nature in the past, and they've repeated the same.

1                   MR. ZEUTENHORST: So, you would envision a  
2 situation where the pattern violator, who was given the notice  
3 by the Agency, could have a clean inspection to get off?

4                   What we've been hearing is that one of the  
5 difficulties with pattern is that once you're on, you're never  
6 off.

7                   MS. RAISOVICH-PARSONS: Yes?

8                   MR. ZEUTENHORST: This seems to indicate that  
9 you would envision a situation where the operator could get  
10 off the pattern?

11                  MS. RAISOVICH-PARSONS: Yes, I think they  
12 could.

13                  MR. ZEUTENHORST: Through?

14                  MS. RAISOVICH-PARSONS: A clean inspection.

15                  MR. ZEUTENHORST: Through a clean inspection,  
16 okay.

17                  In the written comments we received, you  
18 mentioned it this afternoon, that a clean inspection should  
19 not take more than 30 days.

20                  MS. RAISOVICH-PARSONS: Right.

21                  MR. ZEUTENHORST: If you had a large  
22 underground mine, would you envision that MSHA would then send  
23 in a team of inspectors? It's difficult to accomplish an  
24 inspection of an entire mine with a typical inspection team, I  
25 believe, in 30 days. Is that basically correct?

1 MS. RAISOVICH-PARSONS: Well, I think you would  
2 give special considerations to those mines that are on a  
3 pattern, and you would send a team of inspectors to that mine  
4 to be able to accomplish it.

5 MR. ZEUTENHORST: Okay. Thank you.

6 Mr. Butero?

7 MR. BOB BUTERO: Yes. My name is Bob Butero.  
8 I'm with the United Mine Workers. B-U-T-E-R-O.

9 First of all, I'd like to talk about, on the  
10 S & S citation and such. In the early 80's my experience has  
11 been out there in the field, and with the inspectors, and was  
12 that the inspector was almost using the criteria to determine  
13 S & S as the same criteria that he was using imminent danger.  
14 And that was a fact that under the S & S citation, you would  
15 almost have to have a person in an imminent danger situation  
16 to issue an S & S citation.

17 And, the problem with that is that we were just  
18 getting a few of the citations issued S & S, and the rest were  
19 of a \$20 fine nature, and we were seeing a lot more violations  
20 of such.

21 I think since MSHA has upgraded their S & S,  
22 and they've instituted more S & S, I think the overall  
23 citations have been better corrected, and the levels have been  
24 -- as far as negligence, and all that -- has been reduced.

25 One of the problems also in relating to this is

1 the fact that -- and one comparison was made earlier -- in  
2 1980, or so, we had so many violations issued out here in, I  
3 believe, MSHA District 9. And then, in '87-'88, we had an  
4 increase in that. I think one of them was the change of an  
5 Administrator in that department, and the way he administered  
6 the law, compared to the District Manager who administered the  
7 law before that. Now, whether their success rate is any  
8 different than that, I really haven't looked at the statistics  
9 to actually see the overall effectiveness. But it's my  
10 opinion at this time that the one that took effect in '87-'88  
11 has had some input, and has been more effective than the  
12 Administrator previous to that.

13 One other thing, you get into a pattern of  
14 violations, and I believe that many mines out there take on  
15 their business of having programs to better their mine. They  
16 have people set aside to rock dust their belt lines, to clean  
17 their belt lines; to make sure that this is in compliance.  
18 They have people who take regular permissability checks. They  
19 have their operators do a pre-shift examination of their  
20 equipment to see if there are any of the abuses of the  
21 permissability. They have section mechanics who check the  
22 power centers in outby areas. And these people who do this,  
23 and do it on a continuous basis, have very few violations, and  
24 these are the people who won't have one.

25 But if a person doesn't have a program, and

1 their only program at that mine is to abate citations, well,  
2 yes, they're going to get into trouble. And I think Congress'  
3 intent was, after Scotia, was that if you have violations of  
4 the same nature that could lead to a disaster, or lead to  
5 people getting seriously hurt, that they should be put under  
6 the 104(e). I really believe that if an operator takes his  
7 operation and commits the time and the effort and establishes  
8 programs at each of these mines, through education and  
9 training and through the actual assignment of these work  
10 duties, I think it would be very hard for an operator to get  
11 under the pattern of violations under the 104(e). But, once  
12 they're under it, I think it would be tough to get from  
13 underneath it.

14                 But, I think overall, as they operate that  
15 mine, that this would be a hard area to get into.

16                 Also, there might be a way of determining a set  
17 number. If people wanted to find out how many numbers -- what  
18 your proposal says is "a history of violations". Maybe that's  
19 something that could be looked at in 30 CFR, Part 103(c),  
20 Table 6 there, as far as maybe so many citations per  
21 inspection shift. And that way it might give you, not based  
22 on the size of the mine; not based on its production or any of  
23 that, the number of actual citations that are being written by  
24 that inspector during each inspection shift. If you have a  
25 big mine that produces a lot of coal, well of course you're

1 going to have more inspection shifts. But the average would  
2 be the same if you had a one-section mine that works one shift  
3 a day, that inspector's only going to spend so many days  
4 there. So, you might look into that, to maybe give a better  
5 idea of what those numbers could be, instead of looking at  
6 overall tonnage, and such.

7                   Also, we mentioned earlier here about tying it  
8 up to the final decision. We really believe that if an  
9 inspector goes in and issues a 104(d) citation and then he  
10 follows that with an order, he's doing that without a review  
11 or court case. And I think you'd tie their hands up by having  
12 to wait until a court decision is issued before he can go back  
13 and correct the mine's way of doing things.

14                  And, also, on this inspection, as far as  
15 allowing the company to request this inspection to come in, we  
16 feel, like I said earlier, if a company's going to stay off a  
17 pattern and fix his mine where they have programs, then these  
18 programs would be instituted at all times. And if a person  
19 gets into that pattern, I think then they have to concentrate  
20 their efforts on getting these programs in place and  
21 guaranteeing that every shift of every day that that mine  
22 works, that these things are being answered. And hopefully,  
23 through that, if that is being done, then they might have a  
24 chance of getting off the pattern. So, we think that that  
25 should be done over the quarterly inspection that is done, and

1 any 103(i) spots that are there on underground, and then any  
2 bi-annual inspections that happen on a surface or open-pit  
3 mine, to get off of the citation.

4 So, I think in order for the pattern to go in,  
5 the mine has failed to institute programs to guarantee safety.  
6 If they do that, then I think they deserve to be on a pattern  
7 and go with that.

8 That's my testimony for today.

9 MR. ZEUTENHORST: Thank you.

10 You expressed concern at the beginning of your  
11 statement that S & S at one point, in your opinion, was at the  
12 other end of the spectrum -- too few being written.

13 MR. BUTERO: Right.

14 MR. ZEUTENHORST: Have you seen the latest  
15 Program Policy Memo on S & S violations? It, basically, is  
16 the National Gypsum criteria?

17 MR. BUTERO: Yes.

18 MR. ZEUTENHORST: Do you find that adequate?

19 MR. BUTERO: Generally speaking, yes. I feel  
20 that most of it is adequate. The situation that we do not  
21 want to get into is that the inspector has to determine if  
22 there was a citation, and then he has to determine if that  
23 citation itself is going to cause serious injury to an  
24 individual. In a broader sense, if that citation is to exist,  
25 say if you have a dirty belt line which can cause either a

1 fire or explosion, then it's going to affect the people in the  
2 area.

3 I believe that would be more on the S & S  
4 citation area, because if that danger does happen to turn into  
5 an accident, then we're going to have a serious situation  
6 there.

7 What these inspectors were doing, to me, was  
8 they were going out; if they found an accumulation of gas in  
9 the face, instead of being more or less in an imminent danger  
10 type situation, they'd be looking at it as an S & S instead of  
11 that.

12 I really feel that, yes, as long as the  
13 inspector knows what he is considering. And, like I said, I  
14 haven't read all of the guidelines, but, yes, I think it would  
15 be close to it.

16 MR. ZEUTENHORST: Would you concur that the  
17 inspector in looking at any particular violation should not  
18 immediately say, "Oh, it's a roof control standard";  
19 automatically S & S, but he needs to look at the conditions of  
20 that violation? That's my statement; would you concur with  
21 that statement?

22 MR. BUTERO: I would think that if that is in  
23 the active workings, then that would almost constitute an  
24 S & S. You know, if there was a probability that somebody can  
25 be under that roof condition within that eight hours --

1 MR. ZEUTENHORST: Right.

2 MR. BUTERO: -- then that would constitute an  
3 S & S.

4 Now, if it's in an inactive working area, or  
5 such --

6 MR. ZEUTENHORST: Right.

7 MR. BUTERO: -- and he finds that, then maybe  
8 that situation would not really constitute an S & S because  
9 it's not likely that anybody will be in that area for some  
10 period of time.

11 But, if, within a reasonable time, somebody is  
12 likely to be exposed to that violation; whether it be that  
13 shift, the next shift, or even a couple days down the line,  
14 then I would say that would be an S & S.

15 MR. ZEUTENHORST: That still implies some sort  
16 of assessment of the hazard that's here, and whether people  
17 would be exposed to it or not, right? What I'm getting at is  
18 that we've heard some criticism that in certain inspections  
19 all underground roof control standards, if it's in the 200  
20 series, is automatically S & S without any further assessment  
21 of what the actual hazard to the miners is.

22 MR. BUTERO: I would say that there could be  
23 situations where that would not be.

24 MR. ZEUTENHORST: Okay. Thank you. Thank you  
25 very much.

1                   Our next speakers, from the United Mine  
2 Workers, are Crecencio Salazar and Linda Koile-Fischbeck?

3                   MR. CRECENCIO SALAZAR: Chairman, Board, my  
4 name is Crecencio Salazar, S-A-L-A-Z-A-R. I am a  
5 representative of the United Mine Workers, Local 1799 and  
6 Safety member, and I'm employed at Cypress Empire Corporation  
7 with 12 years experience at Eagle No. 5.

8                   Pattern of violations in Sections 104.2, the  
9 United Mine Workers would like to see the mine inspected in  
10 compliance with the records of the mine, at least biannually,  
11 and not just annually.

12                  I don't think any operator should ever let  
13 their mines fall into the history of patterns of violations.  
14 I believe that MSHA should have a procedure to have the  
15 operator start correcting violations immediately, and not put  
16 a time period on the violations. If there is a time period  
17 put on these violations, then have more inspections during  
18 this period to see if the violations are getting corrected.

19                  For example, some violations: Ground cables  
20 being disconnected on plugs or nips or cat heads around power  
21 centers. Guards around feeders, belt drives, tail pieces.  
22 Incorrect labeling on equipment. Accumulation of float dust  
23 on machines. CO and NO checks on diesel equipment.  
24 Telephones not being maintained. Markings on returns and  
25 escapeways with proper reflectors. Not enough velocity of air

1 movement over diesel equipment with plenty of horsepower in  
2 different sections. Rubber matting around power centers.

3 And I could go on with other violations that I  
4 have written down that seem like they just exist year after  
5 year. These are just some of them that I've written down;  
6 since I've been there 12 years, and it's probably not just  
7 Cypress because I've worked at the same mine for 12 years and  
8 there have been three different owners.

9 But, I'd like to turn the rest of it over to  
10 Linda at this point, and she'll continue.

11 MS. LINDA KOILE-FISCHBECK: I'm Linda L.  
12 Koile-Fischbeck; that's K-O-I-L-E, hyphen, F-I-S-C-H-B-E-C-K.  
13 I'm a Safety Committee person, UMWA 1799, District 15, Craig,  
14 Colorado, and I work for Cypress Empire Corporation.

15 Mr. Chairman and panel, a plan is needed to  
16 address mines where operators habitually operate and allow the  
17 occurrence of violations of mandatory safety and health  
18 standards which significantly and substantially contribute to  
19 the cause and effect of mine health and safety dangers.

20 Such operators appear to focus on abatement of  
21 the violations as they are cited, and then fall into the cycle  
22 again from violation to citation to abatement.

23 A plan is in order to restore the mine to safe  
24 conditions, therefore breaking the cycle. The emphasis is not  
25 to expose the miners to the same risks over and over again.

1                 Regarding the 104.2 initial screening, mines  
2 with chronic history of S & S violations need to be reviewed  
3 more than once a year.

4                 Regarding the 104.3(b) of pattern criteria,  
5 identifying mines with a continuous pattern of violations, and  
6 limiting to final citations and orders, operators may  
7 challenge every S & S citation and keep it in a legal time  
8 warp.

9                 I think MSHA should be hard on chronic health  
10 and safety hazard patterns, and recognize that such mine  
11 operators have exhibited a continued disregard for the health  
12 and safety of miners.

13                 Thank you.

14                 MR. ZEUTENHORST: One point of clarification in  
15 both your testimonies on the issue of how frequently mines  
16 should be looked at for a pattern. I think I've heard two  
17 different things. One, the Agency basically in the proposal  
18 said that all mines would be looked at at least once a year,  
19 and I think, Mr. Salazar, you said that you thought all mines  
20 should be looked at twice a year?

21                 MR. SALAZAR: Yes.

22                 MR. ZEUTENHORST: And Ms. Fischbeck, you said  
23 that chronic violators should be looked at more frequently.

24                 One of the things the Agency is trying to deal  
25 with is the best use of our resources. When we say all mines

1 are looked at, from an inspector's point of view -- if it's an  
2 underground mine, four times a year. You can rest assured  
3 when an inspector, before he goes out, he's looking at the  
4 previous inspection reports. But we put in once a year  
5 because that was to look at specifically for a pattern  
6 violator. Saying that, we didn't intend that all mines would  
7 be suspect pattern violators. We intend to target our  
8 enforcement activities to those operators that are truly going  
9 to be a pattern violator.

10 So, you were saying, Ms. Fischbeck, that you  
11 would want those chronic violators to be looked at more  
12 closely. Does that make sense to you?

13 MR. SALAZAR: Yes.

14 MS. KOILE-FISCHBECK: I would like to see at  
15 least more than one time --

16 MR. ZEUTENHORST: Okay.

17 MS. KOILE-FISCHBECK: -- on reviewing.

18 MR. ZEUTENHORST: Okay.

19 MS. KOILE-FISCHBECK: I think the citations  
20 speak for themselves.

21 MR. ZEUTENHORST: Okay. Thank you very much.

22 MS. KOILE-FISCHBECK: Thank you.

23 MR. SALAZAR: Thanks.

24 MR. ZEUTENHORST: Our next speaker from the  
25 United Mine Workers of America is Mr. Larry Neil?

1                   MR. LARRY NEIL: My name is Larry Neil,  
2 N-E-I-L. I'm a representative of the miners for Deserado Mine  
3 in Rangely, Colorado, and I'm a member of Local 1984, United  
4 Mine Workers of America.

5                   Under the purpose, I think MSHA should keep in  
6 mind the Senate Committee report, which stated that Section  
7 104(e) of the 1977 Act was intended as an effective tool to  
8 protect miners when the operator demonstrates his disregard  
9 for the health and safety of miners, through an established  
10 pattern of violations.

11                  I heard commenters suggest that only those  
12 operators who thumb their noses at the law should be  
13 considered for a pattern of violations notice. I suggest that  
14 operators who allow a hazard to exist, over and over again,  
15 exposing miners to these same hazards repeatedly because they  
16 simply allow the hazard to exist and merely abate citations  
17 when they are written, but do nothing to correct the hazard,  
18 should also be included.

19                  As an example: Rib slabbing in an area where  
20 miners would travel. Because you're constantly advancing, you  
21 would be exposed to new areas. And, say you have bad rib  
22 slabbing, and you get a citation because of the hazard  
23 exposing these miners, and you merely scale it down to abate  
24 the citation, but then do nothing in order to control these  
25 ribs from slabbing in the future, when you're exposed to new

1 areas, they could result in the same situation.

2                   Under 104.2, initial screening, the proposed  
3 rule states that at least once each year, MSHA shall review  
4 the compliance records of mines. I would rather see it at  
5 least twice a year, and I think that would be real fair,  
6 simply because you would have at least two quarterly  
7 inspections conducted at that mine, plus any spot inspections  
8 that were conducted at that mine during that two-quarter  
9 period, and you could make a comparison of the two quarters.  
10 And I think that that could go a long ways in establishing  
11 that a pattern may exist.

12                  104.2(b)(2) and (4), evidence of the mine  
13 operator's lack of good faith in correcting a problem and  
14 whether mitigating circumstances exist, that would be real  
15 hard to determine in the first place. And, also, the Senate  
16 Committee report clearly stated that a pattern does not  
17 presuppose any element of an intent or state of mind of the  
18 operator. I think when you start including these as criteria  
19 in order to establish whether a pattern existed, would only  
20 tie the hands of the inspectors and eliminate the hazards that  
21 we need to be looking at.

22                  Section 104.3, pattern criteria. Contrary to  
23 the expressed intention of Congress, MSHA has limited this to  
24 situations which would trigger issuance of a pattern of  
25 violations notice. The criteria, in the proposed rules, the

1 history of repeated S & S violations of a particular standard,  
2 and the history of repeated S & S violation standards related  
3 to the same hazard, and a history of repeated S & S  
4 violations caused by an unwarrantable failure to comply.  
5 These are fine, but they don't go far enough. And, again,  
6 relating to the Senate report, it clearly indicates that the  
7 enforcement mechanism was not to be limited only to violations  
8 of the same standard, nor to violations which are the result  
9 of an operator's unwarrantable failure to comply.

10 Under the proposed rules, 104.3(b), it states  
11 "only final citations and orders shall be used to identify  
12 mines with the potential pattern of violations". This, again,  
13 would severely restrict inspectors to be able to use 104(e) of  
14 the Act, and it would also delay, for months if not a year or  
15 more, establishing that a pattern existed when the need to  
16 establish it is at the time. You can't allow a situation  
17 that's hazardous to miners, in a year from now after you fight  
18 it through the courts, say, "Oh, yeah, it existed a year ago".  
19 We can't help those people then.

20 I also feel that by including this, the  
21 operators will be strongly motivated to challenge all S & S  
22 citations.

23 And it is also against the Act's enforcement  
24 scheme if you compare it to 104(b) and 104(d) orders in the  
25 Act, where they act upon the citation, as written, and the

1 judgment of the inspector, regardless of whether it's  
2 challenged or not.

3               Okay. Section 104.4 under the proposed rules,  
4 issuance of notice, it establishes guidelines for a review and  
5 conference with the District Manager when a pattern notice is  
6 issued.

7               The citations and orders issued to an operator  
8 for a repeated S & S violation of standards provide the  
9 operator with ample warning of a potential pattern in itself.  
10 And an opportunity for conference, as provided in the proposed  
11 regulations, discriminates against the miner's  
12 representatives, because such a conference is currently  
13 provided under 30 CFR, Section 100.6 for review of citations  
14 and orders. And although we are afforded an opportunity to  
15 attend these conferences, they are often located away from the  
16 mine site, many miles, and they are numerous -- as many as two  
17 conferences, on a normal quarterly inspection, as indicated at  
18 our mine. And that's a huge burden for the miners to expect  
19 to pick up, and you want to add more.

20              The proposed regulations require that the  
21 District Manager submit a report if he continues to believe  
22 that a potential pattern of violations exist at the mine. The  
23 proposed regulations require no report, however, if the  
24 District Manager determines that the program has effectively  
25 reduced the occurrence of significant and substantial

1 violations at the mine.

2 I don't understand why we would not have a  
3 report for that, also.

4 Earlier I heard comments suggesting that the  
5 time limit should not be imposed on the operators falling  
6 under a possible pattern of violations notice. Yet, earlier  
7 today, these same commenters wanted to impose time limits on  
8 MSHA and Administrative Law Judges in making their decisions.

9 I support MSHA's decision to develop  
10 regulations for implementing Section 104(e) of the Act.  
11 However, I hope that the final rulings will be more consistent  
12 with the intent of Congress, and remember the purpose of the  
13 Act, and that the coal and other mining industry is to the  
14 health and safety of its most precious resource, the miner.

15 Thank you.

16 MR. ZEUTENHORST: Thank you, Mr. Neil.

17 You had made one comment expressing concern  
18 over the use of evidence of good faith in the initial  
19 screening.

20 By way of background, keep in mind that MSHA's  
21 intent with pattern -- the ultimate intent, I believe, of the  
22 Mine Safety and Health Act, is to provide a safer, more  
23 healthful workplace for the miners. We were looking at the  
24 legislative history, as you obviously have done, in a great  
25 deal of detail, and we were looking at the Senate report that

1 states that the pattern provision should show that "a serious  
2 safety and health management problem exists at the mine".

3 This was, if you will, the flip-side of the  
4 coin. We didn't think we should be targeting an operator who  
5 seems to be making an effort not to violate the law. We want  
6 to target the operators who are consistently violating the  
7 law, allowing the citations to occur. This is why we were  
8 looking at this as an element in the screening, even though it  
9 doesn't have any part in the pattern.

10 On the pattern criteria; just to make clear. I  
11 think you understand the way it's structured now, you could  
12 have any one of three patterns. You don't have to have all  
13 three. You could have a pattern of a single standard. You  
14 could have a pattern of standards relating to the same hazard.  
15 On the third one, where we've heard some concern expressed  
16 before, we looked for a history of repeated violations caused  
17 by unwarrantable failure to comply.

18 What we were trying to address here was, where  
19 you would have S & S violations sprinkled throughout the mine  
20 that don't seem to have any sort of pattern to them, other  
21 than the fact that there's a lot of them; they're recurring,  
22 and what would tie them together would be the unwarrantable  
23 aspect. We tried to define a pattern by the unwarrantable;  
24 where the other two would be clear. It's the same hazard or  
25 the same standard that keeps recurring. That's just the

1 reason why we were proposing this particular aspect.

2 Thank you for your testimony.

3 Our next speaker this afternoon is Mr. Harold  
4 Barnes from Homestake Mining Company.

5 MR. HAROLD BARNES: My name is Harold Barnes,  
6 B-A-R-N-E-S. I am the Corporate Manager of Health and Safety  
7 for Homestake Mining Company.

8 Mr. Chairman, panel, Homestake Mining Company  
9 is one of North America's largest producers of gold, silver,  
10 lead, zinc, and other metals. Our largest domestic operation  
11 employs approximately 1400 miners. This operation has been in  
12 continuous operation, except for a short period of time during  
13 World War II, for over 110 years.

14 Many of the mine's facilities, equipment, and  
15 mining methods, in past years, are not the same as they are  
16 today. To a person not familiar with the hazards of these  
17 previous methods, or the acceptability of these previous  
18 methods, they often don't appear to conform with the  
19 specification-type regulations and standards that we currently  
20 have to comply with in the mining industry.

21 Sometimes citations are issued; often those  
22 citations are S & S. Many times, we don't contest these  
23 citations for a variety of reasons. One being the cost of  
24 resources to contest such citations after they've been  
25 written, and a strong underlying belief in our company that

1 safety and health has to be the number one item in this  
2 business. A commitment shared from the Chairman of our Board  
3 through all of our employees. So, therefore, we simply pay  
4 citations of that nature.

5 We don't desire to apply our limited critical  
6 resources to resolving differences of opinions on S & S  
7 citations, and the related hazards. We would much rather  
8 apply these resources to improve safety and health in the  
9 workplace for our employees.

10 Without question, 104(e) of the Act provides  
11 MSHA with its strongest enforcement tool. Once placed on a  
12 pattern, a mine can expect a succession of closure orders that  
13 would render routine operations impossible.

14 As a result, Congress repeated indicated its  
15 intent to apply the pattern provision to those few  
16 recalcitrant operators who have not responded to other  
17 enforcement tools. To conform with this Congressional intent,  
18 MSHA must recognize that repeated S & S violations, alone, are  
19 simply not enough to place a mine on a pattern. MSHA's  
20 statistics indicate that over 160,000 violations were cited in  
21 1988, and that approximately 95,000, or 60 percent, were  
22 S & S. All large mining operations have a history of repeated  
23 S & S violations.

24 Furthermore, many of the S & S violations cited  
25 are not the result of operator actions. The courts have

1 repeatedly held the Mine Act to be a strict liability statute,  
2 and S & S citations are routinely issued in "no" negligence,  
3 or "low" negligence situations.

8                   We believe that it's important and critical  
9       that an S & S definition, and a definition for unwarrantable  
10      be included in this regulation, to provide a clearer  
11      understanding of the requirements. These pattern regulations  
12      are not comparable to routine, unwarrantable enforcement.

13                   These are specific regulations for a pattern  
14 mandated by Congress which established an enforcement tool.  
15 In order to provide adequate notice to an operator, MSHA  
16 routinely includes such necessary definitions. In fact, in  
17 Part 100, MSHA adopted the National Gypsum definition for  
18 minimum penalties.

19                   The question of a mine coming off of a pattern  
20 of violations, or terminating a pattern of violations, and to  
21 whether the entire mine would have to go through an inspection  
22 or a part thereof, an additional comment on that point. It's  
23 our belief that MSHA has the ability to interpret the statute  
24 in a method that achieves the statutory intent -- improved  
25 safety for miners.

1                   When the Act speaks of no S & S violation at  
2 the entire mine, the only interpretation that makes sense is  
3 no S & S violations of the type that created the pattern. Any  
4 other interpretation would keep a large mine on a pattern  
5 forever, given the 100,000, plus, S & S violations per year,  
6 and the number of violations at any mine routinely. The only  
7 logical interpretation is the interpretation presented by the  
8 American Mining Congress, NCA, and BCOA in their presentation.

9                   We support, generally, the recommendations made  
10 by the industry, and that is all the testimony that I have for  
11 Homestake.

12                  Thank you.

13                  MR. ZEUTENHORST: Thank you, Mr. Barnes.

14                  While I have you here, and since you've  
15 provided me with a copy of the comments you submitted to the  
16 Agency on August 28th, I've just got a question for you.

17                  On Page 4, the statement says, "For example,  
18 prior to 1989, 91 percent of all metal and non-metal  
19 violations were categorized as S & S", although earlier, as  
20 you restated today, 60 percent were S & S, and later on as low  
21 as 30 percent in one metal/non-metal district were S & S.

22                  Is that correct, the 91 percent? Or was that  
23 -- could you explain the context there just for the record?

24                  MR. BARNES: That's a '79 figure, instead of  
25 an '89 figure --